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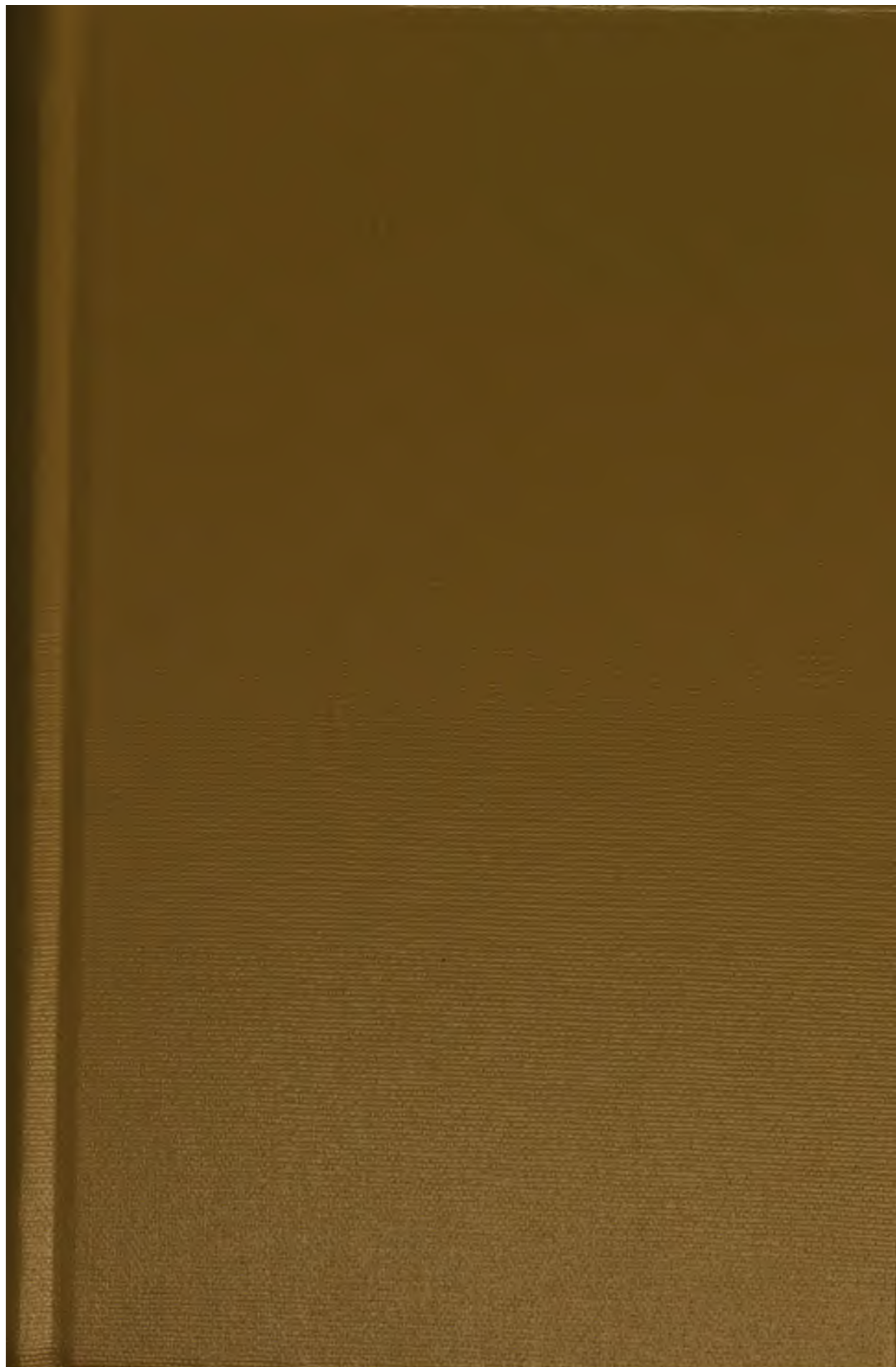
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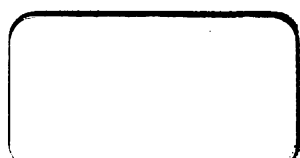
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INSTITUTES
OF
COMMON AND STATUTE LAW.

BY
JOHN B. MINOR, LL. D.,
PROFESSOR OF COMMON AND STATUTE LAW IN THE UNIVERSITY OF
VIRGINIA.

VOLUME IV.
THE PRACTICE OF THE LAW IN CIVIL CASES,
INCLUDING THE SUBJECT OF PLEADING.
IN TWO PARTS—PART I.

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PREFACE TO VOLUME IV.

THE appearance of a *fourth* volume of the "INSTITUTES OF COMMON AND STATUTE LAW," when as yet there has been no *third*, cannot but give rise to some inquiry. The fact was occasioned by the exigencies of the author's business as a public teacher of law; but when it was determined to issue the present volume first, the third was expected to follow it in a succession so immediate as to obviate any material objection thereto. Unpropitious circumstances, however, which have delayed the publication of this volume, have compelled also the postponement of the third, which yet it is hoped may appear in the course of the ensuing autumn or winter.

The kind reception accorded by the bench, as well as the bar, to the first two volumes of the work, whilst it has tended not a little to encourage the author, has also occasioned a degree of solicitude for the success of this instalment of his labors of which before he was not conscious. The boldness which supported him, when he supposed he had little approval to expect from his professional brethren has not been proof to their liberal commendations; and it is with at least as much apprehension as hope, that he submits to their candid criticism this part of the Institutes.

The author has occasion to lament that the appearance of Mr. Barton's valuable work on "The Practice of the Law in Civil Cases," was too late to enable him to make much use of the materials so industriously and judiciously compiled by that writer. He has, however, resorted to its pages with profit, and would have done so yet more frequently had it been issued before his own discussion of the subject was virtually completed.

It cannot be doubted that many a "suspuration of forced breath" will proceed from readers who contemplate the bulk of this volume; and if the "suspuration" should be very emphatic and significant, it is freely admitted that there is apparent cause. The complaint,

however, if complaint there be, should be directed against the *subject*, rather than against the *writer*, who thinks he has generally used in his expositions as much brevity as is compatible with clearness.

Not the least deplorable consequence of this expansion is the necessity of dividing the volume into two segments, which was deemed preferable to the unwieldly size to which it must have attained had it not been so divided. The segments will be designated on the outside as "Vol. IV, Part I," and "Vol. IV, Part II," which it is hoped the reader will not confound with the interior division into "Parts."

This volume being intended in some sort as a *vade mecum* for practitioners, may, and probably will be, used by persons who have not seen the preceding portions of the work. It is proper, therefore, to repeat the explanation of the plan and arrangement, as given in the preface to the first volume.

The reader who opens the book for the first time cannot fail to be struck, and perhaps will be repelled by the very peculiar arrangement of the text, which, though familiar enough to those who for the last thirty years have pursued their legal studies at the University of Virginia, requires explanation. The arrangement in question is designed to exhibit *to the eye*, on the page, not only the carefully digested *order* of the propositions, but their *relative subordination* also, indicated by their standing more or less *to the right*. The most prominent propositions are designated by the Roman numerals, I, II, III, &c., on the *extreme left* of the page; and then, as a guide to the reader, the intended position of the subordinate headings (designated by the Arabic numerals, 1, 2, 3, &c.), is shown by small letters attached to the figures (*e. g.*, 1^a, 1^b, 1^c, &c). Thus, the subordinate heading *first* in importance and comprehensiveness is indicated by 1^a, and the subsequent topics corresponding to that (being placed as nearly under it as possible) are designated as 2^a, 3^a, &c. So the next in subordination is represented by 1^b, placed a little further to the right, and subsequent corresponding heads (as nearly under 1^b as possible) by 2^b, 3^b, &c.

If the reader will turn to the Analytical Table of Contents, which is arranged upon this method, he will have little difficulty in understanding and following the plan, which, indeed, is only novel in the extent to which it has been carried.

UNIVERSITY OF VIRGINIA, *August*, 1878.

INTRODUCTION.

THE practice of the law involves and requires an accurate knowledge of rights, wrongs, and remedies. As a wrong is no more than a *privation of right*, a thorough knowledge of rights implies an acquaintance with wrongs, to which, however, it will be found expedient to give some separate consideration.

The knowledge of rights, and of the wrongs which may affect them severally, embraces a very extensive field of inquiry; and yet is indispensable, of course, to the safe and satisfactory application of remedies.

In a treatise on the Practice of the Law, a due acquaintance with rights must be assumed to be possessed. No systematic exposition of *them* can fairly be looked for in such a work; but at most a partial analysis only, which shall enable the student to recall what he may have previously learned, and assist him to arrange and digest it; but as by the force of circumstances many are constrained to enter upon this branch of the law at the very beginning of their pupilage, pains will be taken in the ensuing essay, by as much explanation of collateral topics as shall prove practicable, to avert any considerable inconvenience from the beginner's premature introduction to it.

The youthful candidate for employment in the law is liable to be called on to advise or assist his client in a bewildering variety of particulars; but in *civil cases*, that is, in cases other than those which relate to the prosecution or defence of persons charged with crime, those particulars will be found to fall under one or other of two great heads, namely:

(I), The Modes of *Securing* against invasion, Rights relating to the *Person and to Property*, and of *Transferring* Rights relating to *Property* from One to Another; and

(II), The Modes of *Vindicating* Rights, whether relating to the Person or to Property, where they have been *actually invaded*; and of obtaining Redress for the Wrong.

And as the proper function of a book on the "Practice of the Law" is to explain all that a practitioner can desire to know of its multiform applications to the business of life, such a book, which is designed to treat of *civil practice*, might be judiciously divided into two great PARTS, corresponding to the foregoing distribution.

The student can hardly fail to observe that the first of these parts is also susceptible of a *twofold division*, and the second of a division more numerous still; so that the most general analysis of the subject to be expounded will fall into the heads following:

(I), PART I. Analytical View of the Modes of *Securing* against Invasion the Rights which relate to the Person and to Property, and of *Transferring* Rights which relate to Property from one Person to Another;

W. C.

I. DIVISION I. Analytical View of the Modes of *Securing* against Invasion Rights which relate to the Person.

II. DIVISION II. Analytical View of the Modes of *Securing* against Invasion Rights which relate to Property, and of *Transferring* them from one Person to Another.

(II). PART II. Analytical View of the Modes of *Vindicating* Rights, whether relating to the Person or to Property, where they have been *actually invaded*, and of Obtaining Redress for the Wrong; and under this head it will be proper to discuss:

I. DIVISION I. Redress of Injuries effected by the mere Act of the Parties.

II. DIVISION II. Redress of Injuries effected by the mere Operation of Law.

III. DIVISION III. Redress of Injuries effected by the Concurring Act of the Parties and of the Law; that is, by *Suit in Court*.

IV. DIVISION IV. The Pursuit of Remedies by *Action at Common Law*.

V. DIVISION V. The Pursuit of Remedies by Proceedings in Courts of *Probate and Administration*; of *Police and Economy*; and by *Motions generally*.

VI. DIVISION VI. The Pursuit of Remedies *by Suit in Equity*.

VII. DIVISION VII. The Pursuit of Remedies by Proceedings *in the Courts of Admiralty*.

General and vague as this short outline is, the reader will do well to ponder it thoughtfully, until he sees distinctly the relations of the several parts one to another, and to the whole. It will be expedient to subjoin another more copious *Analytical Table of Contents*, of which it is hoped that the student will make incessant use, and which, if so used, will be found a highly efficient auxiliary in initiating him into the exposition which follows.

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INSTITUTES
OF
COMMON AND STATUTE LAW.

BOOK THE FOURTH.
OF THE PRACTICE OF THE LAW IN CIVIL CASES,
INCLUDING THE SUBJECT OF PLEADING.

THE introduction to the present volume has already disclosed to the reader the general distribution which it is proposed to make of the extensive subject to be discussed (see Introduction); and it is hoped that that distribution will not be lost sight of; and that the student will also frequently refer to the Analytical Table of Contents, in order to thread his way the more readily through the various and sometimes divergent topics which must be presented for his consideration.

Part I, treating of the modes of *protecting* the rights which relate *to the person* and *to the property*, and also of *transferring* the latter from one person to another, must of necessity be treated far more briefly than will be proper in respect to Part II, which exhibits the *remedies* which the practitioner is called upon to apply, in order to redress the infinitude of wrongs committed by the members of society upon one another.

Of Part I, indeed, little more can be presented than a brief analysis, with such expositions under the several heads as to enable the student to pursue it intelligently through its ramifications, leaving him to trace out the doctrines in detail, in connection with the authorities cited, as future opportunity may serve.

With these preliminary observations we enter upon Part I.

Vol. IV.—1.

PART I.

ANALYTICAL VIEW OF THE MODES OF SECURING AGAINST INVASION
RIGHTS WHICH RELATE TO PERSON AND TO PROPERTY, AND OF
TRANSFERRING RIGHTS WHICH RELATE TO PROPERTY, FROM ONE
PERSON TO ANOTHER.

Rights which relate to the *person* are capable of being *secured*, but not of being *transferred*. The First Division, therefore, of this first part will be devoted to the discussion of the modes of securing such rights *against invasion*; whilst the Second Division will be occupied with an analytical exposition of the modes whereby the rights which relate to property may be both secured *against invasion*, and also *transferred* from one to another.

DIVISION I.

I. Analytical ~~view~~ of the modes of *securing* against invasion those rights ~~which relate to the person~~.

Under this ~~head~~ we are to advert to, (1), Absolute Rights, and (2), Relative Rights;

Wherein consider,

CHAPTER I.

OF ABSOLUTE RIGHTS.

1^a. Absolute Rights.

The discussion of absolute rights will lead us to observe, (1), What is meant by absolute rights, and (2), What are the several absolute rights, and the modes of securing them against invasion;

W. C.

1^b. What is meant by *Absolute Rights*.

Absolute rights are such rights as are independent of the relations of men in society, and constitute the *liberties of the citizen*.

See 1 Bl. Com. 123, & seq.; 1 Institutes Com. & Stat. Law, 52, & seq.

W. C.

1^c. Natural Liberty.

Natural Liberty is the right to dispose of one's person and property as one pleases, so as it be not to the injury of another person, nor contrary to the law of nature. (1 Bl. Com. 127, n (5); 1 Inst. Com. & Stat. Law, 52.)

2^c. Civil Liberty.

Civil Liberty is natural liberty so far restrained by human laws (and so far only) as is necessary and expedient for the public good. (1 Bl. Com. 127, n (5); 1 Inst. Com. & Stat. Law, 52.)

3°. Political Liberty.

Political liberty is the security afforded by the Constitution and form of government, for the enjoyment of civil liberty. (1 Bl. Com. 127, n (5); 1 Insts. Com. & Stat. Law, 52.)

2°. The Several Absolute Rights, and the Modes of *Securing them against Invasion*.

The several absolute rights; are (1), The right of personal security; (2), The right of personal liberty; (3), The right of private property; and (4), The right of freedom of conscience;

W. C.

1°. The Right of *Personal Security*; W. C.1^d. The Particulars wherein the Right of Personal Security consists.

The right of personal security consists in: (1), Security in respect of life, limbs and body; (2), In respect of health; and (3), In respect of reputation. (See 1 Insts. Com. & Stat. Law, 52 & seq.);

W. C.

1°. Security in Respect of *Life, Limbs and Body*.

See 1 Bl. Com. 129 & seq; 1 Chit. Gen. Pract. 32 & seq; 3 Bl. Com. 120 & seq.

2°. Security in Respect of *Health*.

See 1 Bl. Com. 134; 3 Do. 122 & seq; 1 Chit. Gen. Pract. 42.

3°. Security in Respect of *Reputation*.

See 1 Bl. Com. 134; 3 Do. 123 & seq; 1 Chit. Gen. Pract. 43 & seq.

2^d. The Modes of Preventing the Invasion of the Right of Personal Security in *these several Particulars*; W. C.

1°. The Modes of Preventing the Invasion of the Right of Personal Security, in Respect of Life, Limbs and Body.

The modes of preventing the invasion of the right of personal security in respect of life, limbs and body, are as follows, namely: (1), Fear of public punishment and of private damages; (2), Surety of peace, and of good behavior; and (3), Self-defence;

W. C.

1^f. Fear of Public Punishment, and of Private Damages.

It is obvious that it is a primary object of penal laws to inspire, by means of public punishments, such a wholesome terror as will deter the evil-disposed from the commission of acts injurious to individuals and to society. And so also, the apprehension of having to make amends in damages, by private suit on the part of the person injured, produces a like restraining influence, although the immediate purpose of such suit is to procure satisfaction from the wrong-doer, for the injury inflicted. Public

punishments have always been directed to prevent any invasion whatever of the right of personal security, in respect of life, limbs or body, from the most trivial assault, to homicide itself, suitable and various penalties being provided in proportion to the magnitude, that is, the *mischievousness*, of the offence. But by a remarkable lapse from the usual good sense of the common law, no action is by that law allowed for any injury which results in the sufferer's death; nor was that signal defect supplied by statute until a very recent period, namely, in England in 1846, by 9 & 10 Vict. c. 93, and in Virginia by act of 14th January, 1871. (V. C. 1873, c. 145, § 7, & seq.)

At present, therefore, with us, the fear of private damages as well as of public punishment operates to prevent injuries done of purpose as well to the life as to the limbs and body, whilst as to injuries to the life, limbs or body resulting merely from want of due care, not so gross as to be criminal, the restraining influence is to be found exclusively in the fear of private damages.

See 1 Chit. Gen. Pract. Analyt. Table xxiii, & seq; Id. 28 & seq; V. C. 1873, c. 145, § 7 to 10.

2^d. Surety of Peace and of Good Behavior.

Surety of the peace is a recognizance, or obligation of record, payable to the Commonwealth (as in England, to the Crown) in such penalty as the court or officer requiring it shall direct, conditioned to keep the peace and be of good behavior, especially toward the person complaining, for such time not exceeding one year, as the court or officer may appoint. The certificate of the court or officer seems to be sufficient proof by itself of the acknowledgment of the recognizance; but if executed out of court, it is usual for it to be signed and sealed by the parties to it. (Dav. Cr. Law. 380; 2 Bl. Com. 341; V. C. 1873, c. 105, § 4.)

Surety for good behavior is a similar recognizance or obligation of record, except that it is conditioned "to be of good behavior towards the Commonwealth, and all persons therein," although it generally embraces the keeping of the peace also: "to keep the peace towards all persons in this Commonwealth, and especially towards the complainant, and to be of good behavior towards the commonwealth and all persons therein." (4 Bl. Com. 256; Dav. Cr. Law, 499; 1 Hawk. P. C. 485-'6; Mayo's Guide, 636.)

Such surety of the peace or of good behavior may be required by any conservator of the peace, such as every judge throughout the State, and every justice, notary

public, and commissioner in chancery, within his county or corporation, on complaint on oath, or on the personal knowledge of such conservator, that there is good cause to fear (*i. e. to believe*) that any person intends to commit an offence against the person or property of another, or goes armed with a deadly or dangerous weapon without reasonable cause to fear violence to his person, family, or property; or in the presence of a court or conservator of the peace, makes an affray, or threatens to kill or beat another, or commit violence against his person or property, or contends with angry words to the disturbance of the peace; or that he has sold intoxicating liquors by retail contrary to law. (4 Bl. Com. 251, 254-5; 1 Hawk. P. C. 478-9, c. 28, § 1, &c.; V. C. 1873, c. 196, § 1, 2, 8, 9, 10; Id. c. 116, § 1; Mayo's Guide, 628.)

3^d. Self-Defence.

Self-defence, which includes the defence, not only of one's self, but the mutual and reciprocal defence of such as stand in the relations of husband and wife, parent and child, master and servant, is justly called, as Blackstone observes, the primary law of nature, which neither is nor can be taken away by the law of society. Wherever the party himself, or any of these his relations, shall be forcibly attacked in person or property, it is lawful to repel force by force; and the breach of the peace which happens is chargeable upon him only who began the affray. For the law in this case respects human passion, which no prudential motives are for the most part strong enough to restrain; considering moreover, that the future process of the courts is by no means an adequate remedy for injuries accompanied with force; since it is impossible to say to what wanton lengths of rapine, or cruelty, outrages of this sort might be carried, unless it were permitted a man immediately to oppose one violence with another. In our law it is held an excuse for breaches of the peace, nay even for homicide itself; but care must be taken that the resistance does not exceed the bounds of mere defence and prevention; for then the defender would himself become an aggressor. (3 Bl. Com. 3, 4; 4 Do. 183; 1 Chit. Gen. Practice, 11, 33.)

See 3 Bl. Com. 3, &c.; 4 Do. 183; Min. Crim. Synops. 40; 1 Chit. Gen. Pr. 11, 33.

2^d. The Modes of Preventing the Invasion of the Right of Personal Security, *in respect of Health*.

The modes of preventing the invasion of the right of personal security, in respect of health, are: (1), The abatement or removal of nuisances; (2), The writ of in-

junction from a court of chancery; and (3), The fear of public punishment, and of private damages.

W. C.

1st. Abatement or Removal of Nuisances.

Nuisance, *nocumentum*, or annoyance, signifies anything which works hurt, inconvenience, or damage. Nuisances are of two kinds: *public* or *common* nuisances, which affect the public, and annoy the whole community in general, or at least many persons, when they constitute crimes, and are punishable as such, although they may be also civil injuries, if they are specially injurious to any particular individual; and *private* nuisances, which may be defined as anything done to the hurt or annoyance of the *lands, tenements, or hereditaments* of another. (3 Bl. Com. 5, 216 & seq; Bouv. L. Dict. Nuisance; Aldred's Case, 9 Co. 57 b, 59 a.)

Public nuisances consist, amongst other things, of offensive trades and manufactures, whether unwholesome or not; of having any fixture or appliance on one's premises dangerous to the public health; of obstructing streams, so as to affect the health of the community, or hinder navigation or the passage of fish; of polluting streams; of obstructing highways, so as to hinder or delay the transit of passengers thereon; of keeping bawdy, gaming or disorderly houses; of grossly scandalous and public indecency, such as bathing naked near dwellings, highways, or frequented resorts; of erecting or maintaining a powder mill, or powder magazine, or other explosive material, such as nitro-glycerine, near a town; of making and selling squibs, fire-crackers, and the like, or throwing them in a public place; of eaves-dropping, or being a *common* scold; of making disturbing noises, especially at night; of exposing a person affected with a contagious disease, such as small pox, to the public; of suffering a vicious dog, bull, or other animal to go at large, &c. (Bac. Abr. Nuisance, (A); 4 Bl. Com. 167; 1 Russ. Cr. 295 to 303; Id. 305; 2 Whart. Cr. Law, § 2362 & seq; Pennsylvania v. Wheeling Bridge Co., 13 How. 518; Miss. & Mo. R. R. Co. v. Ward, 2 Black, 485.)

Private nuisances consist, amongst a great variety of other instances, of erecting a house so as throw the rain-water which falls on it on a neighbor's land, or so near another's house as to obstruct such neighbor's ancient lights; of keeping hogs or other animals so as to incommode a neighbor, and render the air unwholesome; of polluting a neighbor's stream of water; of obstructing one's right of private way across another's grounds, &c. (3 Bl. Com. 5; Al-

dred's Case, 9 Co. 576, 59 a, & notes; Bouv. Law Dict. Nuisance; Miller v. Trueheart, 4 Leigh, 569.)

All nuisances, public or private, may be abated or removed, public nuisances by any one, they being alike an annoyance to all; and private nuisances by him who is aggrieved thereby, and by him only; and in no case must a breach of the peace or a riot be committed in so doing. And it must, moreover, be observed, that whilst, if they be nuisances of *commission*, previous notice to the wrong-doer is not requisite, yet if they are of *omission* only, an abatement or removal by the sufferer is not allowed until notice to remove has been given to the party concerned in permitting it; save only in the case of branches of trees which overhang a public road, which, being an unequivocal act of negligence in the owner of the soil, constitutes a special exception. (Bac. Abr. Nuisance, (C); 3 Bl. Com. 5, 6; Penruddock's Case, 5 Co. 101, a; Lonsdale v. Nelson, 3 B. & Cr. (9 E. C. L.) 302.) The reason why the law allows this primary and summary method of doing oneself justice, is because injuries of this kind, which obstruct or annoy such things as are of daily convenience and use, require an immediate remedy, and cannot wait for the slow progress of the ordinary forms of justice. (3 Bl. Com. 6; 1 Chit. Gen. Pr. 10, 11, 42.)

2^d. Writ of injunction from a Court of Chancery.

We shall see that it is a highly important branch of the jurisdiction of the courts of equity that they afford adequate and sufficient remedies in all cases of rights where, for any reason, courts of common law cognizance provide no reasonably satisfactory redress. Thus they will, in general, *prevent* a civil injury, wherever damages will not adequately compensate therefor, or where it is requisite in order to avoid repeated litigation about the same subject-matter. The writ employed by the courts of equity in order to arrest the commission, or the continuance of a wrong, where it is proper for them to interpose, is known as the *writ of injunction*, whereby the party is *enjoined* or commanded to abstain from doing or continuing the wrong complained of. Hence, notwithstanding a *public* nuisance is a crime, punishable upon indictment, yet a court of equity will *by injunction* restrain one from the commission or continuance of it wherever a special injury has *resulted to the individual complainant*; and it is necessary to prevent *irreparable mischief*, as one threatening the health of an individual or his family always does. (2 Stor. Eq., § 921, & seq; Irwin v. Dixon, 9 How. 10; Georgetown v. Alexandria Canal Co. 12 Pet. 91; Pennsylvania v. Wheeling Bridge

Co. 13 How. 518; Miss. & Mo. R. R. Co. v. Ward, 2 Black, 485; Parker v. Winnepiseogee Lake Cotton and Wool Co. 2 Black, 545; Beveridge v. Lacey, 3 Rand. 63.) And hence, also, in the case of a *private* nuisance, a court of equity will intervene by way of injunction wherever it is necessary in order to prevent irreparable mischief, as to health, trade, property, or to suppress interminable litigation, or to avoid a multiplicity of suits. (2 Stor. Eq. § 925 & seq; Miller v. Trueheart, 4 Leigh, 569.)

3^f. Fear of Public Punishment and of Private Damages.

See *Ante* p. 3, 1^f.

3^c. The modes of Preventing the Invasion of the Right of Personal Security, in *Respect of Reputation*.

The modes of preventing the invasion of the right of personal security in respect of reputation are, (1), The fear of public punishment *as to libel*, and of private damages *as to libel*, slander, and malicious prosecution; (2), Surety of peace and of good behaviour; and (3), Destroying a libel; W. C.

1^f. Fear of Public Punishment *as to Libel*, and of Private Damages *as to Libel*, Slander, and Malicious Prosecution.

Libel is the malicious defamation of any person; living or dead, made public by writing, printing, signs or pictures, with intent to expose him to public hatred, contempt or ridicule; and in consequence of its tendency to provoke a breach of the peace, and also because the act argues a more deliberate malice, it is punishable *as a crime*, besides being a *civil injury* redressable by the recovery in the appropriate action, of damages, by way of amends. (3 Bl. Com. 123 & seq. and notes; *de libellis famosis*, 5 Co. 125 a; 2 Whart. Cr. Law, § 2535.)

Slander is defamation *by words spoken*, and *malicious prosecution* is a wanton prosecution or arrest in a criminal proceeding or a civil suit, set on foot maliciously and without probable cause. Both are civil injuries merely, and therefore are not liable to be prevented, *as libel is*, as well by public punishment as by private damages, but by private damages only. (3 Bl. Com. 123 & seq; 4 Bl. Com. 150 & notes; 1 Chit. Gen. Prac., Analytical Table, xxvii-viii; Id. 43 & seq; 2 Whart. Cr. Law, § 2535 & seq.)

2^f. Surety of Peace and of Good Behavior.

See *Ante* p. 4, 2^f.

3^f. Destroying a Libel.

It seems the better opinion that the publication of a libel may be prevented *by destroying* it, which, however, must be accompanied by no riot or breach of the peace. (1 Chit. Gen. Pract. 44; *De libellis famosis*, 5 Co. 125 a;

Du Bost v. Beresford, 2 Campb. 511.) And it would seem, if it may be destroyed, and considering the irreparable mischief which the publication may occasion, that a court of equity might, by injunction, restrain the publication. And this conclusion accords with the *dictum* of Lord Ellenborough in Du Bost v. Beresford, 2 Camp. 512. But no direct authority is known to exist for such an exercise of power by the court of chancery.

2^c. The Right of *Personal Liberty*.

Next to personal security, the common law regards, asserts, and preserves the *personal liberty* of individuals. This personal liberty consists in the power of locomotion, of changing situation, or of moving one's person to whatsoever place one's own inclination may direct, without imprisonment or restraint, unless by due course of law. The right, like the right of personal security, is strictly natural, and has never been abridged by our laws without sufficient cause, nor left to the mere discretion of the magistrate, unaccompanied by the explicit sanction of the law. And the language of all the muniments of Anglo-Saxon liberty; muniments which belong as much to us as to our English ancestors, like that of *Magna Charta*, guaranty that no freeman shall be taken or imprisoned but by the lawful judgment of his equals, or by the law of the land. (1 Bl. Com. 134-'5.)

The modes of preventing the invasion of the right of personal liberty are by (1), The fear of public punishment (as for aggravated assault), and of private damages; (2), The writ of *habeas corpus*; and (3), Resistance and self-defence; W. C.

1^d. Fear of Public Punishment (as for aggravated assault), and of Private Damages.

See *Ante* p. 3, 1^l.

2^d. Writ of *Habeas Corpus*.

The writ of *habeas corpus* is the most celebrated writ in the law. Several kinds are made use of by the courts, either for the purpose of removing prisoners from one court into another, for the more easy administration of justice; or for the purpose of formally inquiring into the legality of an imprisonment, and discharging the party if it be found that he is restrained of his liberty without due warrant of law. It is of the latter, the great and efficacious writ in all manner of illegal confinement, of *habeas corpus ad subjiciendum*, to which reference is now made. It is awarded with us when one is alleged to be illegally detained under color of the authority of the United States, or in violation of the federal laws or treaties, by the district or circuit courts of the United States, or by any judge of either of those courts in vacation; and in all other cases of alleged illegal deten-

tion, by any circuit, corporation, or county court of the State, or any judge of either in vacation. It is directed to the person who is supposed to have the party in whose behalf the complaint is made in custody, and commands him to produce the body of the prisoner, with the day and cause of his caption and detention, *ad faciendum, subjiciendum, et recipiendum*, to do, submit to, and receive whatsoever shall be considered in that behalf. The petition is to be accompanied by affidavits or other evidence, showing probable cause to believe that the prisoner is detained without lawful authority; and if the writ is granted, it may be on the terms that a bond be first executed, with surety in a reasonable penalty, payable to the person to whom the writ is directed, conditioned that the petitioner will not escape by the way, and will pay all costs and charges awarded against him. The writ is to be served on the person to whom it is directed, or in his absence from the place where the petitioner is confined, on the person having the immediate custody of him; and prompt obedience to the writ is exacted under stringent penalties. The court or judge, after hearing the matter, both upon the return and any other evidence, shall either discharge or remand the prisoner, or admit him to bail, as may be proper, and shall adjudge the costs of the proceeding as shall seem right. (3 Bl. Com. 131; V. C. 1873, c. 153, § 1, & seq; Id. 156, § 5; Rev. Stats. U. S. § 751, 752 & seq.)

It serves to show the American appreciation of the value and importance of the writ of *habeas corpus*, that both the Constitution of the United States and of Virginia contain provisions prohibiting its suspension, "unless when, in cases of invasion or rebellion, the public safety may require it;" a necessity to be determined of course by the legislature. (Const. U. S. Art. I, § ix. 2; Va. Const. 1869, Art. V, § 14; 2 Stor. Com. Const. § 1342.)

3^d. Resistance and Self-Defence, where the Imprisonment is *clearly Illegal*.

Where the imprisonment is *clearly illegal*, either because the person attempting to effect it has no lawful warrant or authority, or is clearly employing it illegally, the law allows the sufferer to resist the aggression with a force proportioned to that used by the wrong-doer; but when he thus resists, he takes upon himself to determine, *at his peril*, whether there be a lawful authority or not. It is, therefore, more prudent not to resist, except in clear cases of illegality, or where there is strong reason to suspect it, and there is reason to apprehend that, if once in the assailant's power, the party will have no opportunity to appeal to the law for protection or redress. (1 East. P. C. 295 & seq; 1 Hale, P. C. 457

& seq. & notes; 2 Whart. Crim. Law, § 1289 & seq; 1 Chit. Gen. Pract. 49, 634 & seq.)

3°. The Right of *Private Property*.

The right of private property is considered in detail under a subsequent head, and may here be pretermitted.

4°. The Right of *Freedom of Conscience*.

Religion, or the duty which we owe to our Creator and Judge, must be admitted to be the most important concern which can affect mankind, either individually, or in respect of the societies into which they are divided; and if it could be shown that the best way to promote true religion is by governmental interposition and the restraints of municipal law, it must follow that it would be the duty of every state, seeing that it is bound to perfect itself, to interpose in behalf of its subjects, and to prescribe to them their religious faith. But when we reflect that religion is the voluntary homage which each intelligent being offers in his heart to God, and that, in order to worship him acceptably, he must be worshipped "in spirit and in truth;" and when, furthermore, we consider that the holy Author of Christianity, though Lord both of body and mind, yet chose not to propagate it by coercions of either, as it was in his almighty power to do, and that the Christian faith flourished most, and in its purest form, whilst yet in its infancy it had no alliance with the state, but on the contrary daily suffered the fires of persecution, insomuch that to the chiefest of its apostles the Spirit of God himself bore witness, that in every city bonds and afflictions should abide him. (Acts xx 23.) When these things are adverted to, it occasions a sentiment of surprise that it is scarce a century since *freedom of conscience* was first distinctly recognized by any considerable body politic as a natural and absolute right, like those of personal security, personal liberty, and private property. *Toleration* of differences of religious belief had, indeed, been the general policy of England, with more or less of fluctuation, since the sixteenth century; but the institutions of that country do not even yet acknowledge an unqualified freedom of conscience. It was, therefore, a novel and daring experiment, although one warranted by sound abstract reasoning, when, in 1776, George Mason procured to be inserted in the *Bill of Rights* of Virginia, "That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and, therefore, all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the duty of all to practise Christian forbearance, love, and charity towards each other." (9 Hen. Stats. 111, § 16.) A declaration which has retained its place in all subsequent modifications of our organic law.

(Va. Const. 1869, Art. I, § 18.) The germ of the essential principle of freedom of conscience having been thus propounded by Mr. Mason, in 1776, was further and practically developed by Mr. Jefferson, who in 1779 proposed, and the Legislature of Virginia, in 1785, enacted the statute for "establishing religious freedom," by which, after a long and vigorous preamble, it was provided, "That no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinion in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities." (12 Hen. Stats. 86; 1 R. C. 1819, p. 78, c. 31.) And this provision has since been incorporated in the same words into the State Constitution, of which it now constitutes a part. (Va. Const. 1830, Art. III, § 11; Id. 1851, Art. III, § 11; Id. 1869, Art. V, § 14.) It is also provided by the Federal Constitution, that "Congress shall make no law respecting an establishment of religion." (Const. U. S., Amendment I.)

CHAPTER II.

OF RELATIVE RIGHTS.

2*. Relative Rights.

By *relative rights* we are to understand those which belong to persons as they are members of society, and stand in various relations one to another. Those relations may be either *public* or *private*; *public*, being such as subsist between magistrates and people; or *private*, being such as connect and concern private and unofficial persons. With the rights which arise out of the *public* relations, we need not now trouble ourselves; but may confine our attention exclusively to those which accompany the *private* relations, namely of Husband and Wife, Parent and Child, Guardian and Ward, and Master and Servant. (1 Bl. Com. 145 & seq; 422 & seq; 2 Steph. Com. 346 & seq, 267 & seq; 3 Bl. Com. 139 & seq; 3 Steph. Com. 536 & seq; *Ante*, 1 Insts. 67 & seq, 160 & seq; Chit. Gen. Prac. 53 & seq.)

It is worthy to be observed, that in the injuries to these relative rights, notice is only taken of the wrong done by strangers to the superior of the parties related, by the breach and dissolution of either the relation itself, or at least the advantages accruing therefrom; while the loss of the inferior by such

injuries is totally unregarded. One reason for which may be this: that the inferior has no kind of property (as it respects strangers), in the company, care, service, or assistance of the superior, as the superior is held to have in those of the inferior; and, therefore, the inferior can suffer no loss or injury, of which the law will take account, from the conduct of strangers to the superior. The wife cannot by the common law recover damages for beating her husband, for by that law she has no separate interest in anything during her coverture. The child has no property in the father or guardian, as they have in him, for the sake of giving him education and nurture, and in the father's care, because he is entitled to his services. And so the servant whose master is disabled, does not thereby lose his maintenance or wages. He has no property in his master; and if he receives his part of the stipulated contract, he suffers no injury, and is, therefore, entitled to no action for any battery or imprisonment, or other wrong which the master may happen to endure. (3 Bl. Com. 142-'3; 3 Steph. Com. 541-'2.)

Let us now observe how the injuries which may be done to one in respect of each of the above-named private relations may be prevented;

W. C.

1^b. Rights which arise out of the Relation of *Husband and Wife*; W. C.

1^c. The Injuries which may be done to one in the *Relation of Husband*.

See 3 Bl. Com. 139-'40; 3 Steph. Com. 536 & seq;

W. C.

1^d. Abduction of Wife.

See 3 Bl. Com. 139; 3 Steph. Com. 536.

2^d. Adultery or *Criminal Conversation* with Wife.

See 3 Bl. Com. 139-'40; 3 Steph. Com. 537.

3^d. Beating or otherwise Abusing Wife.

See 3 Bl. Com. 140; 3 Steph. Com. 537-'8.

2^c. Modes of Securing a *Husband* against Injuries in the *Relation of Husband*; W. C.

1^d. Resistance as to *First and Third*.

See 3 Bl. Com. 3; 4 Bl. Com. 191, 183; 1 Chit. Gen. Prac 19, 59; *Ante*, p. 5, 3^f.

2^d. Surety of Peace and of Good Behavior as to *all*.

See *Ante*, p. 4, 2^f.

3^d. Fear of Public Punishment and of Private Damages as to *all*.

See *Ante*, p. 3, 1^f.

4^d. Writ of *Habeas Corpus*, as to *First*.

See *Rex v. Meade*, 1 Burr. 542, *Sedgrave*; *Rex v. Clarkson et al*, 1 Stra. 444; *Rex v. Johnson*, 1 Stra. 579; *Ante*, p. 9, 2^d.

2^b. Rights which Arise out of the Relation of *Parent and Child*.

See 3 Bl. Com. 340; 3 Steph. Com. 538.

W. C.

1^c. The Injuries which may be done to one in the Relation of *Parent*; W. C.

1^d. Abduction of Child.

See 3 Bl. Com. 140; 1 Insts. Com. & Stat. Law, 397 & seq.

2^d. Beating of Child.

See 3 Bl. Com. 140, n (27).

3^d. Seduction of Daughter.

See 3 Bl. Com. 140, n (27); 1 Insts. Com. & Stat. Law, 201-'2.

2^c. Modes of Securing a *Parent* against Injuries in the *Relation of Parent*; W. C.

1^d. Resistance as to *First* and *Second*.

See *Ante*, p. 5, 3^f.

2^d. Surety of Peace and of Good Behavior as to all.

See *Ante*, p. 4, 2^f.

3^d. Fear of Public Punishment as to *First* and *Second*, and also as to *Third* when there is a *promise of marriage*, and of Private Damages as to all.

See V. C. 1873, c. 187, § 16; *Ante*, p. 3, 1^f.

4^d. Writ of *Habeas Corpus* as to *First*, where the Child is too young to exercise any discretion or choice as to his Protector.

See *Rex v. Delaval*, 3 Burr. 1434; *Pearson's Case*, 4 J. B. Moore, 366; *King v. Greenhill*, 4 Ad. & El. (31 E. C. L.), 624; *Armstrong v. Stone & ux*, 9 Grat. 112; 1 Insts. Com. & Stat. Law, 401-'2; *Ante*, p. 9, 2^d.

3^b. Rights which arise out of the Relation of *Guardian and Ward*; W. C.

1^c. The injuries which may be done to one in the *Relation of Guardian*; W. C.

Abduction of ward.

This, it seems, is the only injury which a guardian can suffer as such, in respect to the *person of the ward*.

See 3 Bl. Com. 141; 3 Steph. Com. 539; 1 Insts. Com. & Stat. Law, 437, & seq.

2^c. Modes of Securing a Guardian against Injury in the *Relation of Guardian*; W. C.

1^d. Resistance.

See *Barker v. Taylor*, 1 Carr. & P. (11 E. C. L.) 101; 1 Chit. Gen. Pract. 69, 70; *Ante*, p. 5, 3^f.

2^d. Surety of Peace and of Good Behavior.

See *Ante*, p. 4, 2^f.

3^d. Writ of *Habeas Corpus*, when the Ward is too young to exercise discretion or choice in selecting a Protector.

See Cases *Supra*, in respect to *Abduction of Child*. *Ante* p. 5; 1 Insts. Com. & Stat. Law, 438-'9; *Ante*, p. 9, 2^d.

4^d. Fear of Public Punishment and of Private Damages.

See *Ante*, p. 9, 2^d.

4^b. Rights which arise out of the Relation of *Master and Servant*.

- See 3 Bl. Com. 141, & seq; 3 Steph. Com. 539, & seq;
W. C.
- 1^o. The Injuries which may be done to a *Master* in the *Relation of Master*; W. C.
- 1^d. Abduction of Servant.
See 3 Bl. Com. 142.
- 2^d. Beating of Servant.
See 3 Bl. Com. 142. 3 Steph. Com. 539-'40.
- 3^d. Seduction of Female Servant.
See 3 Bl. Com. 142, n (30); 3 Steph. Com. 540; 1 Insts. Com. & Stat. Law, 201, 202.
- 4^d. Hiring Servants already Engaged to Another.
See 3 Bl. Com. 142; 3 Steph. Com. 539.
- 2^o. Modes of Securing a *Master* against Injuries in the *Relation of Master*; W. C.
- 1^d. Resistance as to *First* and *Second*.
See 3 Bl. Com. 3; *Ante*, p. 5, 3^r.
- 2^d. Fear of Public Punishment as to *First* and *Second*, and also as to *Third* where there is a *promise of marriage*, and of Private Damages as to *all*.
See V. C. 1873, c. 187, § 16; 1 Insts. Com. & Stat. Law, 201-'2; *Ante*, p. 3, 1^r.
- 3^d. Surety of Peace and of Good Behavior as to *First*, *Second*, and *Third*.
See *Ante*, p. 4, 2^r.

DIVISION II.

II. ANALYTICAL VIEW OF THE MODES OF SECURING AGAINST INVASION THOSE RIGHTS WHICH RELATE TO PROPERTY, AND OF TRANSFERRING THEM FROM ONE PERSON TO ANOTHER.

The modes of thus securing and transferring rights which *relate to property*, are (1), By contracts *executory*; (2), By powers; (3), By contracts *executed*, or conveyances; and (4), By wills;
W. C.

CHAPTER I.

OF CONTRACTS EXECUTORY.

- 1^a. Modes of Securing and of Transferring Rights which relate to *Property*, by means of *Contracts Executory*.

The discussion of *contracts executory* will involve the consideration of (1), The *definition* of a contract executory; (2), The circumstances necessary to the validity of such a contract; and (3), The several sorts of such contracts;

W. C.

- 1^b. Definition of a Contract Executory.

A contract executory is a *mutual agreement* between two or more *competent parties* for *valuable consideration*, touching a *lawful subject matter*. (Bouv. Law Dict. Contract; 2 Kent's Com. 449; 2 Steph. Com. 108-'9 & note; 2 Bl. Com. 442.)

2^b. The Circumstances necessary to the Validity of a Contract Executory.

The circumstances necessary to the validity of a contract executory are, (1), Parties competent to contract; (2), A legal subject matter; (3) A valuable consideration; and (4), Mutual assent. (2 Bl. Com. 442; 2 Kent's Com. 449; Chit. Cont. 2; 1 Pars. Cont. 300, &c; Smith's Cont. 267 & seq.)

W. C.

1^a. Parties Competent to Contract.

All persons are competent to contract, with a few exceptions, growing out of *want of understanding*, *want of freedom of will*, or *want of adequate ownership in the subject matter*; W. C.

1^a. Parties wanting in *Understanding*.

Infants, idiots, and lunatics, and persons drunken, are wanting in understanding, and so in general cannot contract validly. (Smith's Cont. 268; Id. 301 & seq; Id. 307.)

2^a. Persons wanting in *Freedom of Will*.

Married women and persons under duress, are wanting in *freedom of will*, and so for the most part are incapable to contract. (Smith's Cont. 289; Id. 16.)

3^a. Persons wanting in *competent ownership* of the subject-matter.

See 2 Bl. Com. 447; V. C. 1873, c. 183, § 27.

2^a. A *Legal Subject-Matter*.

See Smith's Cont. 176 & seq; Id. 241, &c.

3^a. A *Valuable Consideration*.

A valuable consideration is a benefit to the party promising, or to a third person at his request, or an inconvenience, loss, or injury, or the risk of it to the party promised. (2 Bl. Com. 445, n (19); Smith's Contracts, 141.)

The *amount* of the consideration, so it be *appreciable*, is immaterial, save only that, if grossly inadequate, it may tend to *prove a fraud*. (Smith's Cont. 147.)

A valuable consideration is presumed *conclusively* in the case of a *sealed instrument* from the *solemnity* of the transaction. And so also, it is presumed, in case of a mercantile security, *prima facie*, as between the original parties, and conclusively as to subsequent *bona fide* holders for value, &c., out of regard to the *interests of trade*. (Smith's Cont. 16, 133, 151-'2.)

The reasons of policy which have induced the requirement of a *valuable consideration*, actual or presumed, in order to sustain an executory contract (in pursuance of the maxim, *ex nudo pacto non oritur actio*) are threefold: (1), To pro-

tect the promisor himself from the consequences of improvident and unconsidered or fictitious engagements; (2), To guard his estate after he is dead against similar demands; and (3), To protect his creditors against collusive and pretended promises, whereby his property might be absorbed by persons who were mere gratuitous claimants, to the prejudice of those who had advanced full value for their demands. (Smith's Cont. 139.)

4°. Mutual Assent.

The parties must agree *to the same thing at the same time*. (Smith's Cont. 126 & seq.) As to contracts *by letter*, see Chit. Cont. 13, 14; 1 Pars. Cont. 406 & seq; Taylor v. Merchant's Fire Ins. Co. 9 How. 390.

3°. The several sorts of *Executory Contracts*.

The several sorts of executory contracts are: (1), Contracts *to pay money*; and (2), Contracts *to do Collateral things*; W. C.

1°. Contracts to pay Money.

Contracts to pay money may be classed as, (1), Common law securities; and (2), Mercantile securities; W. C.

1^a. *Common Law Securities*.

Common law securities for money are contrasted with *mercantile securities*, because the latter, although now adopted into, and regulated by the common law, were originally unknown to it, and grew up and came into use in pursuance of the *custom and usage of merchants*.

Common law securities originated in the common law, which still, in most particulars, determines their qualities and incidents, although a few statutory modifications have been introduced. (2 Bl. Com. 340, 465 & n, (36); V. C. 1873, c. 139, § 2; Id. c. 127, § 3; Id. c. 126, § 19.)

The common law securities for the *payment of money*, embrace, (1), Bonds; and (2), Promissory notes, not negotiable;

W. C.


1°. Bonds.

Bonds are *deeds* (that is, writings *under the maker's seal*) obliging him to pay a designated sum of money to a party named. Hence, the instrument itself is termed an *obligation*, or a *writing obligatory*, the maker the *obligor*, and the person to whom the money is to be paid the *obligee*. (2 Bl. Com. 340; 465 & n, (36); Shepp. Touchst. 56, 57; Bac. Abr. Oblig'n, (c); Com. Dig. *Faits* (A. 2); 2 Rob. Pr. (2d Ed.) 2; Goddard's Case, 2 Co. 5 a, & n, (H); Ball v. Dunsterville, 4 T. R. 313; *Ld. Lovelace's Case*, W. Jones, 268; V. C. 1873, c. 139, § 2; *Jenkins v. Hunt*, 2 Rand. 446; *Clegg v. Lemessurier*, 15 Grat. 108.)

A seal at common law is *an impression upon wax*, or some other tenacious material, (not on the paper or parchment itself,) and may be made in any way, and with a stick or any other object, provided it be done by the obligor himself, or in his presence and by his direction, or by an agent acting under a power from him, authenticated by his seal. It is not necessary that it should be acknowledged as a seal in the body of the instrument; but whether a writing is sealed, is proved *by the fact* when it is produced; whilst whether the impression appearing on the wax is the seal of the party is to be proved like any other fact, by the testimony of those acquainted with it. Several parties may seal with one seal, and the impression may be adopted and acknowledged as the seal respectively of any number of persons. (Authorities *supra*; Cooch v. Goodman, 2 Ad. & El. (29 E. C. L.) 598; Ball v. Taylor, (11 E. C. L.) 417; Warren v. Lynch, 5 Johns. (N. Y.) 244; Mackey v. Bloodgood, 9 Johns. 285; Ludlow v. Simonds, 2 Cai. Cas. (N. Y.) 1; 2 Insts. Com. & Stat. Law, 755 & seq.)

In Virginia, a scroll *affixed by way of seal*, is declared by statute to be of the same force as if the writing were *actually sealed*, (V. C. 1873, c. 140, § 2; Id. c. 15, § 9, (cl. 12); but in the case of a *bond*, the sole proof that the scroll was *affixed by way of seal* is to be found in the fact that it is acknowledged as a seal *in the body of the instrument*, as in the concluding clause, "witness my hand and seal." No extrinsic proof that it was affixed as a seal can in such case be admitted. (2 Insts. Com. & Stat. Law, 756; Clegg v. Lemessurier, 15 Grat. 108.)

As one impression upon wax may, at common law, be adopted as the seal of any number of persons, so it would seem, *a fortiori*, may one scroll be acknowledged by any number of parties as the *seal of all*, as where the writing concludes, "*witness our hands and seals*." This is thought to be derivable from the common law, and that *a fortiori*, because an actual seal, that is *an impression on wax*, &c., may, and sometimes does, have no distinctive character at all; and so is believed to be the weight of American authority. (Bohannon v. Lewis, 3 Monr. (Ky.) 377; Bowman v. Robb, 6 Barr. (Pa.) 302; although it should be observed that a contrary doctrine was assumed in Virginia, in Rankin v. Roler, 8 Grat. 63, 67; (2 Insts. Com. & Stat. Law, 653-'4, 756.)

What constitutes a scroll, within the statute, is not clearly ascertained. A circle of ink,  is certainly sufficient, and so are *printed stamps*. See Buckner v. Mackay, 2 Leigh, 489; 2 Insts. Com. & Stat. Law, 654.

The authority to execute a bond must be of equal dignity with the bond itself, that is, *under seal*, or else it must be done in the party's presence, and by his authority. (2 Insts. Com. & Stat. Law, 654.) As to the effect of one partner executing a bond in the partnership name, for a partnership debt, see 2 Insts. Com. & Stat. Law, 654.

Bonds are either (1), Single bills; (2), Penal bills; or (3), Bonds, with condition *to pay money*, or *to do some collateral thing*, of which the former only (that is, bonds with condition to pay money,) are in this connection to be considered.

W. C.

1^f. Single Bills.

A single bill (*simplex obligatio*) is a bond promising to pay to the *obligee* a named sum, without condition or penalty; *e. g.*:

FORM OF SINGLE BILL.

\$1,000 On demand (or — months after date, &c., *as the case may be*,) I bind myself and my heirs to pay to J. S. one thousand dollars. Witness my hand and seal this — day of —, 18—.

D. D., (SEAL.)

2^f. Penal Bills.

A penal bill is a bond obliging the obligor to pay a named sum to the obligee, in the penalty of a larger sum, *usually, but not necessarily, double*, although, if it be no more than the principal, it is *not a penal*, but a *single bill*. (Fleming v. Toler, 7 Grat. 310); *e. g.*:

FORM OF PENAL BILL.

\$1,000 On demand (or — months after date, &c., *as the case may be*),
2 I bind myself and my heirs to pay to J. S., one thousand dollars, in
2,000 the penalty of two thousand dollars. Witness my hand and seal this
— day of —, 18—.

D. D., (SEAL.)

The penalty at common law, after default of payment of the principal sum, *is the debt*; and relief against this rigorous doctrine could be had in equity alone, (3 Bl. Com. 435), until 4 and 5 Anne, c. 16, (A. D. 1707), which directed judgment to be entered *for the penalty*, but to be discharged by the *principal sum, with interest*. (2 Bl. Com. 341; 3 Do. 435; V. C. 1873, c. 173, § 16.) The penalty, however, still regulated the jurisdiction, whenever that depended *on amount*. (Newell v. Wood, 1 Munf 556; Heath et al v. Blaker et al, 2 Va. Cas. 216); but by act of 1849, it is provided that the principal sum due shall determine it. (V. C. 1873, c. 179, § 2.)

3^f. Bonds with Condition.

A bond with condition is a bond obliging the obligor to pay a named sum to the obligee, with a condition under-written, to be void if certain specified terms be complied with, which may be either *to do a collateral thing*, (e. g. to make a title to land; to discharge the duties of an office faithfully, &c.,) or *to pay a sum of money*, usually one-half of the penalty. It is with the latter class of such bonds that we are at present concerned. Bonds with *collateral condition*, will be referred to presently.

Bonds with condition *to pay money* are, *in effect*, neither more nor less than *penal bills*, and are governed by the same principles. (2 Bl. Com. 241; 3 Do. 435; V. C. 1873, c. 173, § 16; Id. c. 179, § 2); *e. g.*:

FORM OF BOND WITH CONDITION TO PAY MONEY.

\$1,000	I promise to pay to J. S. two thousand dollars, to which I bind
2	myself and my heirs. Witness my hand and seal this — day of
2,000	——, 18—.

The condition of the above obligation is such that whereas I am held and firmly bound unto the said J. S. in the sum of one thousand dollars, to be paid to the said J. S. on the — day of —, in the year 18—, now if I shall pay to the said J. S. the said sum of one thousand dollars, on the day and year aforesaid, the above obligation is to be void, otherwise to remain in full force and virtue.

D. D. (SEAL)

2°. Promissory Notes, not Negotiable.

A promissory note, not negotiable, is a promise in writing, *not under seal*, to pay a named sum to the promisee. If it be payable unconditionally *to bearer*, or *to the order* of the payee, at a bank, or saving's bank, or licensed broker's office *within this State*, it is said to be *negotiable*. (V. C. 1873, c. 141, § 10; Peasley v. Boatwright, 2 Leigh, 195); W. C.

FORM OF PROMISSORY NOTE, NOT NEGOTIABLE.

\$1,000	On demand (or — years after date, &c., <i>as the case may be</i>), I
	promise to pay to J. S. one thousand dollars, for value received.

D. D.

2^d. Mercantile Securities.

A *mercantile security* is an *order*, or it is a *promise*, in writing, to pay a *named sum unconditionally*, to the payee or his *order*, or *to the bearer*. In case of the *promise*, it must, in Virginia, be payable at a bank, savings bank, or licensed broker's office, *within this State*. It possesses certain very important properties and privileges, derived from the *custom and usage of merchants*. (2 Bl. Com., 466, &c.; 2 Kent's Com. 71, &c.) But by the statute 3 and 4 Anne, c. 9, any

note in writing made payable to another person, or *his order*, or to *bearer*, for any (*certain*) sum of money is made assignable *like bills of exchange*, thereby converting it into a *mercantile security*. And, as in several of these States the statute of Anne has been literally adopted, it follows that in all those States a promissory note, in order to be negotiable, need not, as with us, be payable at any particular place. (2 Bl. Com. 467.; Bac. Abr. Merchant (M.), 2.)

It does not appear to be essential to the character either of a bill of exchange or of a promissory note, that it should be *negotiable*. Neither is so unless it be payable to *order* or to *bearer*; but it may, notwithstanding, possess the other attributes of such writings; such, for example, as being entitled to days of grace, &c. (Averett's Adm'r v. Booker, 15 Grat. 167; Chadwick v. Allen, 2 Str. 706; Kendall, 6 T. R. 123; Burchall v. Sloccock, 2 Ld. Raym. 1545; Stor. on Bills, § 69.)

1°. The Different kinds of Mercantile Securities.

There are two kinds of mercantile securities, namely; (1), Bills of Exchange, which, originally, was the only sort, and (2), Certain promissory notes;
W. C.

1°. Bills of Exchange.

A bill of exchange is an order *in writing* to pay a *named sum of money unconditionally to the order* of a designated person, or *to bearer*; or it is an open letter of request, addressed by one person (called the drawer), to another (called the drawee), desiring him to pay a *named sum of money, unconditionally, to bearer*, or *to the order* of a person designated, (styled the *payee*.) (V. C. 1873, c. 141, § 1 to 9, 11.)

Let us advert to (1): The several kinds of bills of exchange, and (2), The diversities existing between them;
W. C.

1°. The several kinds of Bills of Exchange; W. C.

1°. Foreign Bills of Exchange.

A foreign bill of exchange is a bill drawn by a person in one State or country on one in another. (Smith's Merc. Law, 203 and n. *, 209-'10; Brown v. Ferguson, 4 Leigh, 37; Buckner v. Finley, 2 Pet. 586; Bank of U. S. v. Daniel, 12 Pet. 23.)

Such bills are usually drawn *in sets* of two, three, or more, in order to meet the contingencies which formerly attended the transmission of communications between foreign countries, and of course each one of the set provides that it shall be good only in case that the others are *not paid*, (Smith's Merc. Law, 210); *e. g.*:

FORM OF A FOREIGN BILL OF EXCHANGE.

\$1,000.

CHARLOTTESVILLE, VA., October —, 18—.

At sight (or — days after sight, etc., *as the case may be*.) of this my first of exchange, (second and third of same tenor and date not paid), pay to J. S. or order, ("or to bearer") one thousand dollars, value received, and charge to account of

D. D.

To A. A., Esq., Montreal, Canada.

2^k. Inland Bills of Exchange.

An inland bill of exchange is a bill drawn by a person on some one *in the same State or country*. (Smith's Merc. Law, 203, n *; Bouv. Law, Dict. Bill of Exchange.) *e. g.*:

FORM OF AN INLAND BILL OF EXCHANGE.

\$1,000

CHARLOTTESVILLE, VA., October —, 18—.

At sight (or — days after sight, etc.,) pay to J. S. or order, ("or to bearer") one thousand dollars, value received.

D. D.

To A. A., Esq., Richmond, Va.

2^s. Diversities existing between Foreign and Inland Bills;
W. C.1^h. Diversity in Form.

The chief diversity *in form* is that which makes the needful provision, that only one of the *set* in which it is customary to draw *foreign bills*, in order to guard against the contingencies of transmission, shall stand good as in the form above. An inland bill, of course, needs no such provision. (Smith's Merc. Law, 210.)

2^h. Diversity in *Treatment* by the Holder of the Bill.

Both sorts of bills of exchange require *presentment* to the drawee, and *notice of dishonor*, in order to charge the drawer, or endorser thereof; but a *foreign bill* must be *protested*, and *no other evidence* of the dishonor can be adduced. In the case of an *inland bill*, on the other hand, the dishonor may be proved not only *by the protest*, but by any other competent and satisfactory testimony. (Smith's Merc. Law, 248.)

2^f. Promissory Notes made Negotiable *by Statute*.

See V. C., 1873, c. 141, § 7, 11.

A promissory note *negotiable* with us is a promise in writing, not under seal, whereby the maker promises to pay to a designated person, or *his order*, (or *to bearer*), *unconditionally*, a *named sum* of money, payable in *Virginia*, at a bank, or savings bank, or licensed broker's office, *within the Commonwealth*. (V. C. 1873, c. 141, § 7, 11; Mann v. Sutton, 4 Rand. 252.)

The English Statute, 3 & 4 Anne, c. 9, which puts certain promissory notes upon the footing of bills of exchange, requires, as we have seen, only that they should

be for a *sum certain*, payable *unconditionally* to the payee, or his *order*, or *to bearer*, and does not, like the Virginia Statute, restrict them to be payable at any *particular place*. (Smith's Merc. Law, 197; Bac. Abr. Merchant (M.) 2; 2 Bl. Com. 467); *e. g.*:

FORM OF NOTE NEGOTIABLE.

\$1,000

CHARLOTTESVILLE, October —, 18—.

— days after date, for value received, I promise to pay to the order of J. S. (or to bearer), one thousand and $\frac{100}{100}$ dollars, negotiable and payable without off-set, at the First National Bank, Richmond, Virginia.

The maker and endorsers of this note waive, as to this debt, the exemption from liability of the property which either may be entitled to hold exempt under the provisions of the *homestead-exemption law*. D. D.

2°. The Differences between *Mercantile* and *Common-law Securities*.

Common law securities are mere evidences of, and securities for debt. Mercantile securities afford a similar evidence and security; but *by the custom and usage of merchants*, from a very early period, they have been also employed *in place of money*, as *supplemental to the currency*. And to this latter fact the marked diversities between the two classes of securities are due.

These diversities consist in the particulars following, namely: (1), Assignability; (2), Non-availability of set-off, or of failure of consideration, &c.; (3), Presumption of valuable consideration; and (4), Promptness and extent of remedy;

W. C.

1°. Assignability.

Mercantile securities are *transferable* from one to another, so as to vest a *legal title* in the transferee; such an attribute being indispensable in order to adapt them to be used *like money* in the payment of debts, and in other transactions of life. Common law securities are not thus transferable. At first, they were not permitted to be assigned *at all*, in pursuance of the maxim of the common law, that "*Choses in action are not assignable*;" and although the rigor of that doctrine has been somewhat relaxed, yet, still nothing passes by the transfer but the *equitable title*, to which in Virginia a statute, (V. C. 1873, c. 141, § 17,) superadds the privilege to the assignee of asserting that title, (*equitable* though it be), in *his own name* in a *court of law*, in case of *bonds and notes for the payment of money*, but of no other *choses in action*. (Smith's Merc. Law, 190.)

2°. Non-availability of *Set-off*, or of *Failure of Consideration*, &c.

No set-off, nor failure of consideration, nor fraud in the consideration, nor any other invalidity, save one arising out of some statute (as *e. g. that of gaming or usury*) is available in case of *mercantile securities* in the hands of a subsequent *bona fide* holder *for value*. Innocent assignees for value, of *common law securities*, on the other hand, are not protected, but take subject to all just discounts, not only against themselves, but against the assignor, before the defendant had notice of the assignment. (V. C. 1873, c. 141, § 17.)

This attribute of mercantile securities, as was above remarked, is obviously indispensable, in order to fit them for the purposes of *currency*.

3^d. Presumption of *Valuable Consideration*.

In mercantile securities a valuable consideration is presumed, *prima facie* as to the original parties, and *conclusively* as to subsequent *bona fide* holders *for value*.

In *common law securities under seal*, a valuable consideration, as between the parties, is *conclusively presumed* from the solemnity of the instrument. If not under seal, a valuable consideration *must be proved*. In Virginia, by statute (V. C. 1873, c. 141, § 10), in case of notes for the payment of money, a valuable consideration is *prima facie* presumed, at least where an *action of debt* is brought on the writing. (Peasley v. Boatwright, 2 Leigh, 198.)

This trait of mercantile securities is also necessary in order to make them useful as a *supplement to the currency*.

4^d. Promptness and Extent of *Remedy*.

In case of mercantile securities, the remedy against an assignor *for value* arises immediately upon the *default* of the principal debtor; and the remedy extends not against the immediate assignor only, but against any one ever so remote, and may be prosecuted against all of the assignors at the same time, but in *separate actions*, at common law. In Virginia, by statute (V. C. 1873, c. 141, § 13), if the bill or note *has been protested*, an action of *debt* may be maintained against *all the parties* who are liable upon it *jointly*, or against *any one* of them, or against an *intermediate number* of them.

In common law securities, on the other hand, the remedy is against the *immediate assignor* alone at common law (there being no *privity of contract* but with him); although in Virginia, by statute, it may be also against a *remote assignor* (V. C. 1873, c. 141, § 18.) But against such assignor, whether immediate or remote, no suit can be brought merely upon default of payment by the principal debtor, but only when *legal recourse against him has been exhausted*. (3 Rob. Pr. (2d ed.) 210, 211, & seq.)

2°. Contracts touching some *Collateral thing*, that is, something *other than the Payment of Money*.

Contracts executory touching collateral things consist of (1), Bonds with collateral condition; and (2), Agreements other than bonds with collateral condition ;
W. C.

1°. Bonds with *Collateral Condition* ; W. C.

1°. General Nature of *Bonds with Collateral Condition*.

A bond with *collateral condition* is a bond to pay money with a condition annexed, *to be void* if a collateral stipulation to do or omit something be complied with. At common law, the penalty is forfeited by the breach of the condition, and then becomes a *debt*, and as such is recoverable by an *action of debt*, the relief to the obligor being in a court of equity alone, which was accustomed to enjoin (*i. e. prohibit*), the obligee from compelling the obligor to pay the penalty, provided the latter would pay the *actual damages* sustained in consequence of the breach of the stipulation in the condition. By Stat. 8 & 9 Wm. III, c. 11, § 8 (A. D. 1697), the obligee was permitted to assign *as many breaches* of the condition as he thought fit, a jury was called to assess the damages sustained by reason of such breaches, and judgment was rendered for the penalty, to be discharged by the payment of the damages assessed. And this statute exists generally in the United States. (V. C. 1873, c. 173, § 17; Id. c. 12, § 6, 7; Id. c. 159, § 14; Bac. Abr. Oblig'n. (A) 3; Gainsford v. Griffith, 1 Saund. 58, n (1).)

2°. The most *frequent Instances* of Bonds with Collateral Condition ; W. C.

1°. Bonds Conditioned to *perform the Award of Arbitrators*.

This is often styled an "*Arbitration bond*." It is an obligation to pay a named sum of money, such as the parties mutually agree upon as a penalty, with a condition under-written that the obligation shall be void if the obligor complies with the award. (Grayd. Forms, 122, No. 24, 123, No. 28; Tate's Forms, 125.)

2°. Bonds Conditioned to *Convey Lands, &c.*

Such a bond, denominated a "*Title-bond*," is an obligation to pay a named sum of money, with a condition under-written that the obligation shall be void if the obligor, whether vendor or vendee, shall comply with the stipulations of the contract of sale, recited in the condition. (Rob. Forms, 572; Grayd, Forms. 124, No. 29; Tate's Forms, 132, 134, 140,) *e. g.*:

FORM OF TITLE BOND.

Know all men that I, J. S., am held and firmly bound unto R. P. in the sum of twenty thousand dollars, to be paid to the said R. P., his heirs, personal representatives, or assigns. For the payment whereof I bind myself, my heirs, and as-

signs firmly by these presents. Sealed with my seal, and dated this 13th day of October, in the year of our Lord, ———.

The condition of the above obligation is such that whereas the above-bound J. S. has agreed to sell and convey to the said R. P., possession to be given immediately, a tract or parcel of land, called ———, lying in ——— county, estimated to contain ——— acres, be the same, however, ever so much more or less, and bounded as follows:

[State the boundaries.]

for which the said R. P. has agreed to pay the above-bound J. S. the sum of ——— dollars, in ——— equal annual instalments of ——— dollars each, the first to be due and payable on the ——— day of ———, in the year of our Lord ———, and the remainder of the said instalments to be paid severally on the same day annually in each successive year thereafter for ——— years; and whereas, it is agreed by and between the said parties, that after the payment to the above-bound J. S., by the said R. P., of the ——— of the said instalments, the above-bound J. S. shall and will immediately thereupon convey the premises aforesaid, with all the appurtenances thereunto belonging, by good and sure title, in fee-simple, to the said R. P., his heirs and assigns, by sufficient deed of conveyance, with proper and usual covenants of title against the claim of all persons. Now if the above-bound J. S. shall well and truly, and according to the true intent and meaning hereof, perform and satisfy each and all of the stipulations aforesaid on his part to be performed and satisfied, so that no default therein, or in any part thereof, on his part shall occur, and until the conveyance aforesaid of the said premises shall be made as aforesaid, shall permit the said R. P., his heirs and assigns, peaceably and quietly to possess, hold and enjoy the premises aforesaid, with the appurtenances thereunto belonging, without let or hindrance, then the above obligation to be void, or else to remain in full force and virtue.

J. S. (SEAL.)

3f. Sheriffs' Bonds.

The bond of a sheriff is an obligation, in Virginia, in a sum of from \$20,000 to \$50,000, and in the city of Richmond of from \$100,000 to \$300,000, with a condition under-written reciting that the principal obligor has been appointed and commissioned as sheriff, and providing that, if he shall faithfully discharge the duties of his office, the obligation shall be void. (V. C. 1873, c. 49, § 2, 3, 4; Id. c. 12, § 6; Rob. Forms, 377-'8.)

In common with all other bonds required by law to be taken, or approved by or given before any court, board or officer, unless otherwise provided for, it must be made payable to the *Commonwealth of Virginia*. (V. C. 1873, c. 12, § 6.)

4f. Constable's Bonds.

The bond of a constable is, in Virginia, in a penalty of not less than \$2,000, with a condition similar to that of the sheriff's bond. (V. C. 1873, c. 49, § 16; Id. c. 12, § 6; Rob. Forms, 377, -'8)

5f. Bond of Sergeant of Corporation.

See V. C. 1873, c. 49, § 7; Id. c. 12, § 6.

6^f. Guardian's Bond.

A guardian's bond is an obligation in a penalty prescribed by the court by which the guardian is appointed, or in which he accepts the trust, usually about *double* the estimated value of the ward's property, with condition to be void if he shall faithfully discharge the duties of his trust. (V. C. 1873, c. 123, § 5, 7; Id. c. 12, § 6; Rob. Forms, 383; Tate's Forms, 128), *e. g.* :

FORM OF GUARDIAN'S BOND.

Know all men by these presents, that we, R. G. and M. S., are held and firmly bound unto the *Commonwealth of Virginia*, in the sum of — dollars, to the payment whereof we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this — day of —, in the year of our Lord, —.

The condition of the above obligation is such, that whereas, the above-bound R. G. hath this day, by the county court of — county, been appointed guardian of W. W., orphan of O. W., deceased. If, therefore, the said R. G. shall faithfully discharge the duties of said trust, and at the expiration thereof shall deliver and pay all the estate and money in his hands, or with which he is chargeable by reason of such trust, to those entitled thereto, then the above obligation to be void; otherwise to remain in full force and virtue.

R. G. (SEAL)

M. S. (SEAL)

7^f. Bond of Executor or of Administrator.

See V. C. 1873, c. 126, § 1, 2, 5, 6; Id. c. 127, § 2; Id. c. 12, § 6; Tate's Forms, 126; Id. Supplement, 56-77.

8^f. Refunding Bond.

A *refunding bond* is an obligation given to a personal representative by a legatee or distributee, to whom a legacy or distributive share is paid, conditioned to refund due proportions of any debts or demands which may afterwards appear against the decedent, and of the costs attending their recovery. (V. C. 1873, c. 128, § 36 to 38; Tate's Forms, 129; Rob. Forms, 391; First Appendix to this work.)

9^f. Indemnifying Bond.

An *indemnifying bond* is an obligation given to a sheriff or other officer who levies, or is required to levy, any legal process on property, and a doubt arises whether the property is liable to the levy. It is conditioned (1), To *indemnify the officer* against all damages in consequence of the seizure or sale of the property; (2), To *pay any claimant* of the property all damages which he may sustain by the seizure or sale; and (3), To *warrant and defend* the property to any purchaser thereof at the sheriff's sale. (V. C. 1873, c. 149, § 4; Mayo's Guide, 131; First Appendix to this work.)

10^f. Delivery or Forthcoming Bond.

A delivery or forthcoming bond is an obligation given to the creditor at whose suit a writ of *feri facias*, or a distress warrant, is issued, which has been levied upon chattels that the debtor wishes to retain in his possession, and *at his risk*, until the day of sale thereof. It is conditioned to have the property *forthcoming* or *delivered* at the day and place of sale. (V. C. 1873, c. 185, § 1; Mayo's Guide, 129-'30; First Appendix to this work.)

2^d. Agreements Executory and Collateral *other than Bonds with Collateral Conditions*.1^o. The general nature of such Agreements; W. C.1^f. Agreements of *Record*.

Of this description are recognizances, judgments, decrees, forthcoming bonds, *when returned to the clerk's office* after being forfeited; agreements to submit to arbitration to be made a rule of court, &c. (2 Bl. Com. 465, n (36); Smith's Cont. 3, &c.; Chitty's Cont. 23; V. C. 1873, c. 185, § 2; Rob. Forms, 81-'3, 240, 246.)

2^f. Agreements *under Seal*; W. C.1^o. Nature and Requisites of a *Sealed instrument*..

See 2 Bl. Com. 266, & seq; 2 Rob. Pr. (2d ed.), 2, &c.

2^o. Effect of Penalty Annexed.

See Chit. Cont. 863; 3 Rob. Pr. (2d ed.), 362; Jenkins v. Hurt's Comm'rs, 2 Rand. 446.

3^o. The several kinds of Sealed Instruments.

See 2 Bl. Com. 295, &c.; Sheph. Touchst. 50, & seq; W. C.

1^h. Deeds Indented; W. C.1^f. Nature of Deeds Indented.

Deeds indented are deeds *inter partes*, wherein the parties *mutually stipulate*. Thus, if A stipulates to convey land to B, and B stipulates in the same deed to pay him for it an agreed price, the deed is a deed indented, or an *indenture*. On the other hand, if only one party, or set of parties, stipulates, it is called a *deed poll*.

2^f. Why *Deeds Indented* are so styled.

From the manner in which the original and the counter-part (or copy) were at first prepared, namely, on a large sheet of parchment, and then separated, not by a straight cut, but in such a manner as to give to both an indented or *toothed edge*.

2^h. Deeds Poll; W. C.1^f. Nature of *Deeds Poll*.

Deeds poll are deeds wherein but one party, or set of parties, stipulates, *e. g.*, an ordinary *bond for money*.

2^f. Why *Deeds Poll* are so styled.

From the fact that the edges of the deed were not toothed or indented, but *smooth*.

3^c. Agreements *not under Seal*.

These are known as *simple contracts*, or *parol contracts*, which latter phrase, whilst properly it means *verbal contracts*, imports also contracts *not under seal*, whether made by word of mouth only, or in writing. Of this sort are agreements to submit a cause to arbitration, to sell or to buy a tract of land, to build a house, &c. (2 Bl. Com. 465, & n (36); Tate's Forms, 35.)

2^c. Forms of *Collateral Agreements* other than Bonds with collateral condition, most frequently in use.

See Grayd. Forms, 46 & seq; Tate & Sands' Amer. Forms, 438, &c.; First Appendix to this work.

CHAPTER II.

OF POWERS.

2^a. Modes of Securing and of Transferring Rights which relate to Property by means of *Powers*.

See 2 Lom. Dig. 417, &c.; 4 Kent's Com. 315, &c.

W. C.

1^b. The General Nature of Powers.

A power is an authority enabling a person to do an act which otherwise he could not do. (Bouv. Law. Dict. Power.) We may regard powers under the heads of, (1), Common law authorities; (2), Powers under the Statute of Uses, to declare a future use; and (3), Powers under the Statute of Grants, to declare a future interest;

W. C.

1^c. Common Law Authorities; W. C.

1^d. Powers or *Letters of Attorney*.

Powers or letters of attorney have existed not only from the earliest periods of the common law, but of human society itself. The common law prescribes for them no particular form. They may be as well not under seal as possessed of that solemnity, save only that where the thing to be done is to make *livery of seisin* of the freehold of lands, or to *execute a sealed instrument*, the power is required to be under seal; those transactions being deemed by the law to be *peculiarly solemn*.

See V. C. 1873, c. 112, § 3; Oliver's Convey. 335; Grayd. Forms, 334, &c.

2^d. Powers Contained in *Wills*.

Powers contained in wills have been in use, whenever the subject matter could be disposed of by will, as at common law might have been done as to *chattels* from the earliest

period, but as to *lands of freehold* only by the special custom of particular places. (2 Th. Co. Lit. 636). But such powers have been frequent even as to freehold estates in lands ever since wills of lands were authorized by Stat. 32, Hen. VIII, c. 1, (A. D. 1541). The statute, in allowing lands to be devised, allowed also powers to be conferred upon the devisees for a limited period, (*e.g.* for life), or even upon a *stranger*, to make a further disposition of the subject at a future time, as is also the case with us. (2 Lom. Dig. 205 & seq.).

When the power conferred is a *power of sale* conferred upon the executor, and the executor fails to qualify, or dies, or is removed, the power may by statute be exercised by the *administrator with the will annexed*. (V. C. 1873, c. 127, § 1).

2^c. Powers under the *Statute of Uses*, to declare a future Use.

By means of such a power a person is enabled, through the medium of the *Statute of Uses*, to dispose of an interest vested either in himself or in a stranger. (2 Bl. Com. 335, 340; 2 Insts. Com. & Stat. Law, 740, &c.)

It may well be questioned whether such a power can exist under the statute of uses in Virginia, so as to transfer the *legal estate*, or even an *equitable* one. (V. C. 1873, c. 112, § 14; 2 Lom. Dig. 148; 4 Kent's Com. 315 &c.; 2 Insts. Com. & Stat. Law, 740)

3^c. Powers under the *Statute of Grants*, to declare a Future Interest.

The statute of grants enacts that lands, as to the *immediate freehold* thereof, shall lie *in grant* as well as *in livery*, (V. C. 1873, c. 112, § 4); and there seems no reason to doubt that, in like manner, as powers may arise under the statute of wills, so they may be comprised *in grants*, authorizing either one having an interest, or a stranger, to designate the person who, at a future time, shall enjoy the property.

2^b. The Forms of Powers most frequently in use.

See Grayd. Forms, 334; Tate & Sands' Amer. Forms, 120, &c.; First Appendix to this work.

CHAPTER III.

OF CONTRACTS EXECUTED.

3^a. Modes of Securing and of Transferring Rights which relate to Property, by means of *Contracts Executed*.

Under this head are to be treated, (1), *Conveyances*; and (2), *Incumbrances*, with the modes of executing and authenticating them.

In *contracts executed* the same circumstances or elements must exist as in *contracts executory*, save only a *valuable consideration*; that is to say, there must be, (1), Parties competent; (2), A legal subject-matter; and (3), A mutual assent;

W. C.

1^b. *Conveyances of Property.*

It cannot have escaped the student's observation, that there are two classes of property, very different *in nature*, and as we shall see *in attributes*, which must here be distinguished, namely, one fixed, permanent and immovable, such as *land*, known as *property real*, and the other susceptible of being removed from place to place, and endued with no fixedness or permanency, as cattle, jewels, &c., and which, from its being capable of accompanying the person of the owner, is denominated *property personal*, or *chattels*;

W. C.

1^c. *Conveyances of Chattels.*

For the conveyance of *present interests* in chattels, for *valuable consideration*, no writing is required; but the transfer may be, as between the parties, by parol, although as to creditors, and purchasers for value, and without notice, there must be either a delivery or a deed recorded. But gifts, (that is, *gratuitous transfers*) of chattels must always be accompanied by *actual delivery*, or must be *by deed*. So also, if one possessed of a *future interest* in chattels desires to transfer it, since delivery is impossible, the transaction, even though there be a valuable consideration, always requires a *deed*. (Irons v. Smallpiece, 2 B. & Ald. (4 * E. C. L.) 552; Bunn v. Markham, 7 Taunt. (2 E. C. L.) 81; Bryson v. Brownrigg, 9 Ves. 1; Antrobus v. Smith, 12 Ves. 39; Ewing v. Ewing, 2 Leigh, 341; Barker v. Barker's Adm'r, 2 Grat. 347.)

If the chattel possesses much value, a written memorandum of the transfer, signed by the grantor, is commonly made, which is styled a *bill of sale*; not that it is in any case *necessary*, but as a matter of *prudence*, to secure easy proof of the grantee's title. Except in the case of *gifts*, as above stated, or transfers of *future interests*, the *bill of sale* may be as well *without a seal* as with it. For the *forms* of bills of sale, see Grayd. Forms, 77, &c.; First Appendix to this work.

In the case of *gifts of chattels*, unaccompanied by *continuing possession* in the grantee; of *mortgages and deeds of trust*; and of *marriage-settlements* of chattels, they must be *registered*, in order to be good *as to creditors and subsequent purchasers for value, and without notice*. (V. C. 1873, c. 114, § 4, 5; Id. c. 117, § 4, 7.)

2^c. *Conveyances of Lands, and of Rights connected with Lands.*

Conveyances of lands, and of rights connected therewith, by *living persons*, (and exclusive therefore of *wills*, which will be considered in another place,) may be effected in several ways, namely: (1), By *matter in pais*; (2), By *matter of record*; and (3), By the *special custom of particular places*;

W. C.

1^d. Conveyance of Lands, and of Rights connected with Lands, by *Matter in Pais*.

We are to note, under this head, (1), The persons capable of conveying, and of receiving conveyance of lands; (2), The nature of the instruments of conveyance; (3), The usual and orderly parts of a deed of conveyance of land; (4), The several sorts of conveyance by *matter in pais*; (5), The manner of executing conveyances; (6), The most usual forms of conveyance; and (7), The registry of deeds of conveyance;

W. C.

1^e. The Persons capable of *Conveying* and of *Receiving Conveyance of Lands*, &c.

See 2 Bl. Com. 288, &c.; V. C. 1873, c. 117, § 4, 7;

W. C.

1^f. Persons capable of *Conveying Lands*, &c.

All persons, for the most part, may convey lands, &c., so that it is more convenient to consider, by classes, those who are *incapable to convey*. And the persons incapable to convey are, (1), Those wanting in *understanding*; (2), Those wanting in *freedom of will*; and (3), Persons wanting in *complete ownership* of the subject-matter;

W. C.

1^g. Persons *wanting in Understanding* to comprehend the Transaction.

See 2 Insts. Com. & Stat. Law, 571 & seq;

W. C.

1^h. Infants under twenty-one years of age.

See 2 Insts. Com. and Stat. Law, 572.

2^h. Idiots and Lunatics, that is, persons non-sane for any cause.

See 2 Insts. Com. and Stat. Law, 571.

3^h. Persons Drunken.

Drunkenness renders a contract *voidable*, (1), Where the promisor is so much intoxicated as to be unable to *understand the business*; (2), Where it has been brought about *by the other party*; and (3), Where the other party *takes advantage of the intoxication*. But in the last two of these cases the invalidity is to be *referred to fraud*, and not to want of understanding. (2 Insts. Com. and Stat. Law, 573-'4.)

2^e. Persons Wanting in *Freedom of Will*.

Persons wanting in freedom of will are, (1), Person under duress; and (2), Married women. (2 Insts. Com. and Stat. Law, 574 & seq.)

W. C.

1^a. Persons under Duress.

See 1 Bl. Com. 136-'7; Chit. Cont. 206; -Bac. Abr. Duress, (A) and (B); 2 Insts. Com. and Stat. Law, 574 and seq;

W. C.

1^a. Persons under *Duress of Imprisonment*.

See 1 Bl. Com. 136-'6; Chit. Cont. 206.

2^a. Persons under *Duress per Minas*, or by Threats.

See Chit. Cont. 107; Bac. Abr. Duress; Id. (A); 3 Th. Co. Lit. 67.

2^a. Married Women.

There are two reasons why, in general, a married woman can engage in no transaction of business, viz: (1), Because she has, in law, as to business matters, no *separate existence*, but is *one with her husband*; and (2), Because she is under the *constraining influence of her husband*. (2 Insts. Com. and Stat. Law. 576 & seq.)

W. C.

1^a. Method adopted at *Common Law* to enable married women to *aliene their lands*.

At common law, married women were enabled to aliene their lands by means of a collusive judicial proceeding, either by way of *fine*, or of *common recovery*. The judicial proceeding being a suit against the woman and her husband, upon a pretended adverse and paramount title, obviated the objection of the legal *oneness* of husband and wife, whilst the supposed *constraining influence* of the husband was done away with by a privy examination of the wife, apart from the husband, by the court, or by a commissioner appointed for the purpose. (2 Bl. Com. 355, 293; 2 Th. Co. Lit. 610, n. (1); 2 Insts. Com. and Stat. Law, 580.)

2^a. Method adopted in *Virginia*, whereby married women may *aliene their lands and chattels*.

See V. C. 1873, c. 117, § 4, 7; 2 Insts. Com. and Stat. Law, 581 & seq;

W. C.

1^a. Doctrine Applicable to *Conveyances of Married Women*.

The transaction being an exception to the common law, which permitted a married woman in general to do no act of business in her own behalf, is to be *construed strictly*. (2 Insts. Com. and Stat. Law, 581.)

2^k. Principles to be observed in respect to the transactions of Married Women.

See 2 Insts. Com. and Stat. Law, 582 ;

W. C.

1^l. The Statute applies only to *Conveyances* of Lands or Chattels.

2^l. The Husband *must be a Party*.

3^l. Husband and Wife must both *sign the Deed*.

4^l. *Privy Examination* of the Wife must *appear to have been made*.

5^l. *Explanation* of the Writing must *appear to have been made to the Wife*.

6^l. *None of the Requisites prescribed* must be omitted in the certificate of the Authorities.

7^l. *No other Disability is obviated* save that of Cover-
ture.

3^s. Persons *wanting in Complete Ownership* of the Sub-
ject-matter.

Persons who, being in possession as the apparent owners, and yet are wanting in the actual and complete ownership of the subject-matter of a conveyance, are: (1), Persons attainted of treason or felony; (2), Aliens; and (3), Corporations. (2 Insts. Com. & Stat. Law, 582-'3);

W. C.

1^h. Persons Attainted.

Attainder, by express enactment, produces *no forfeiture* with us. (V. C. 1873, c. 195, § 5.)

2^h. Aliens.

Alien-friends are, with us, by statute, capable of buying, *holding*, transmitting, and receiving lands, by *purchase or descent*, in the same manner as citizens. (V. C. 1873, c. 4, § 18.) *Alien-enemies* are subject to the same disability as at common law; they can acquire lands *by purchase*, but *not by descent*, and *cannot hold* the land they obtain by purchase. (1 Insts. Com. & Stat. Law, 143 & seq.)

3^h. Corporations.

Corporations can *hold*, and therefore can *convey*, lands only as far as the charter allows, or the objects of incorporation require. (V. C. 1873, c. 56, § 2; Id. c. 109, § 3; 2 Insts. Com. & Stat. Law, 585; Do. 523; 1 Do. 547-'8.)

2^f. Persons Capable of *Receiving a Conveyance of Lands*.

All persons, in general, are capable of receiving a conveyance of lands; so that it will be best, as under the preceding head, to consider by classes such as are *incapable*. And even in cases of incapacity, it is for the most

part *not an absolute*, but a *qualified* incapacity. (2 Insts. Com. & Stat. Law, 583, &c.)

The classes of persons incapable in this qualified way of receiving a conveyance are, (1), Persons wanting in *understanding*, or in *freedom of will*; (2), Persons *insufficiently designated*; and (3), Persons who cannot by law *hold lands*;

W. C.

1^s. Persons wanting in *Understanding*, or in *Freedom of Will*.

Although the grantee be wanting in understanding, or in freedom of will, the conveyance is *prima facie* valid, because it is presumed to be for the *grantee's benefit*. It may be disclaimed by him, however, upon the removal of the disability. (2 Insts. Com. & Stat. Law, 583.)

2^s. Persons *Insufficiently Designated*.

A conveyance made to persons insufficiently designated, is inoperative and void. (2 Insts. Com. & Stat. Law, 584; V. C. 1873, c. 77, § 2 & seq; Id. c. 76, § 8 & seq; 13 & seq.)

3^s. Persons who cannot by Law *hold Lands*.

Alien-enemies are of this character. They can *take* lands, but *cannot hold* them. (*Supra* p. 34, 2^h.) Corporations belong also to this class, beyond the limits set down in their charters; or the objects of their incorporation. (*Supra* p. 34, 3^h.)

2^e. The Nature of the *Instruments of Conveyance*; W. C.

1^f. The Principles which, at *Common Law*, regulate the Conveyance of Lands; W. C.

1^s. Lands as to the *immediate freehold*, at Common Law, "*lie in livery*," and not "*in grant*."

2^s. *No Writing* is at common law required to transfer *any estate whatsoever in lands*; not even a fee-simple.

3^s. For the transfer of an *estate of inheritance*, at common law, the word "*heirs*" is indispensable.

2^f Certain Modifications of the Common Law Principles of conveyancing *made by Statute*; W. C.

1^s. Statute of Uses, 27 Hen. VIII, c. 10, (A. D. 1536.)

This statute, whose design was to *abolish uses altogether*, enacts, in substance, that, when *one person is seised* of lands, &c., to the use of another, by *any ways or means whatsoever*, the possession of him who is seised shall be deemed to be transferred to him *who has the use*, for the estate he has in the use, as fully as if he had been enfeoffed of the lands, &c., with *livery of seisin*. (2 Insts. Com. & Stat. Law, 727.)

The corresponding statute, in Virginia, is less compre-

hensive, applying only to cases where the use is raised by (1), *Deeds of bargain and sale for valuable consideration*; (2), *Covenants to stand seised*, for consideration of *natural love and affection*; and (3), *Lease and release*, the lease being a bargain and sale *for a year*, and the release operating by way of *enlargement*, as at common law. (V. C. 1873, c. 112, § 14; 2 Insts. Com. & Stat. Law, 730.)

The effect of the statute of uses is to substitute a *constructive* for an *actual* livery of seisin.

2^g. Statute to *prevent Frauds and Perjuries*, 29 Car. II. c. 3 (A. D. 1688); W. C.

1^b. Provision Relating to Conveyances of Lands.

Requiring the conveyance of any real estate *exceeding three years* to be by *deed or writing*. (29 Car. II. c. 3, § 1, 2, 3; 2 Insts. Com. & Stat. Law, 586-'7.)

In Virginia, the conveyance of any land for an estate of inheritance, or of freehold, or for a term exceeding five years, must be *by deed*. (V. C. 1873, c. 112, § 1.)

2^b. Provision relating to *Contracts Executory touching Lands*.

Requiring any *contract for any interest whatsoever* in lands to be in writing, signed by the party *to be charged*, or his agent. (29 Car. II. c. 3, § 4.)

In Virginia, *any contract* for the sale or lease of land for a term *exceeding one year* shall be *in writing*, signed by the *party to be charged*, or his agent. (V. C. 1873, c. 140, § 1.)

3^b. Provision Relating to the *Making of Wills of Lands*.

Requiring a *will of lands* to be *in writing*, signed by the *testator*, or by some one in his presence, and by his direction, and *attested by three or more credible witnesses, subscribing their names in the testator's presence*. (29 Car. II. c. 3, § 5.)

In Virginia, a *will of lands* must be *in writing*, signed by the *testator*, or by some one in his presence, and by his direction, in such a manner as to make it manifest that the name was *intended as a signature*; and if not *wholly written by the testator, attested by two or more competent witnesses, present at the same time, subscribing their names in the testator's presence*. (V. C. 1873, c. 119, § 4.)

3^g. Statute in Virginia dispensing with the word "*heirs*," or any other word of *inheritance*, to create an Estate of Inheritance. (V. C. 1873, c. 112, § 8.)

4^g. Statute of *Grants*, 8 & 9 Vict. c. 106 (A. D. 1845.)

Enacting that all lands, as to the immediate freehold thereof, shall lie *in grant*, as well as *in livery*. (2 Insts. Com. & Stat. Law, 587.)

In Virginia we have a statute (of 1850) to the same effect. (V. C. 1873, c. 112, § 4.)

5^s. Statutes of *Registry*.

No *general* statutes of *registry* exist in England. In Virginia, it is enacted that *contracts* for, and *conveyances* of, lands, for any interest *exceeding five years*, and all *marriage-settlements*, and deeds of *trust or mortgage* for any interest whatsoever, as well as other liens, shall be void as to *creditors*, and *subsequent purchasers* for value and without notice, *until and except* they are duly recorded. (V.C.1873, c.114, §5, &c; Id.c.117, §1 to 3, &c.)

3^o. The Usual and Orderly parts of a Deed of *Conveyance of Land*.

These usual and orderly parts of a deed of conveyance of land are, (1), The premises; (2), The *habendum*; (3), The *tenendum*; (4), The *reddendum*; (5), The conditions; (6), The warranty of title; and (7), The conclusion. (2 Bl. Com. 298; 4 Kent's Com. 460, &c.; 2 Lom. Dig. 205, &c.)

W. C.

1^t. The Premises.

The premises set forth the *parties* and the *subject-matter* of the conveyance by sufficient description, together with the *consideration* and the estate or interest proposed to be conveyed. (2 Lom. Dig. 280; 2 Insts. Com. and Stat. Law, 629.)

2^t. *Habendum*.

The *habendum* limits the *certainty of the estate* or interest intended to be conveyed. Hence (with some exceptions), none can take, nor can any subject be taken, if not named in the premises. And hence, also, whilst the *habendum* may *qualify*, it may not *contradict the premises*. (2 Lom. Dig. 288; 2 Insts. Com. & Stat. Law, 629; *Humphreys v. Foster*, 13 Grat. 563.)

3^t. *Tenendum*.

The *tenendum* was formerly much used, being designed to signify the *tenure* and *feudal services*, whereby the land conveyed was to be holden. Since the Stat. 12 Car. II. c. 24, reducing all the tenures of England virtually to the single one of *free and common socage*, the *tenendum*-clause has been of little or no use practically in England, and is quite out of place in Virginia, and in the United States generally, at least in *conveyances in fee-simple*. (2 Bl. Com. 298-9; Id. 77; 2 Insts. Com. & Stat. Law, 630.)

4^t. *Reddendum*.

This clause sets forth the *reditus*, return or rent reserved (originally for the most part in *military services*) for the land that passes. (2 Insts. Com & Stat. Law, 630.)

5^f. Conditions.

The clause of conditions sets forth whatever *qualification* it may please the parties to annex to the *estate*, or interest conveyed, upon the observance or non-observance of which the estate is to *arise* or to be *defeated*. (2 Bl. Com. 299; 2 Insts. Com. & Stat. Law, 630, 224, 228.)

6^f. Warranty of Title.

Warranty of title is the assurance or guaranty of title stipulated by the grantor in a conveyance. No warranty of title is *implied* in conveyances of lands, unless there is a *reversion in the grantor*, and unless, in case of a *freehold estate* (e. g. for life) the word *grant* be employed, save in case of a *partition* and *exchange*. (2 Lom. Dig. 27, 317, &c.; 1 Bl. Com. 300; 2 Insts. Com. & Stat. Law, 631 & seq.)

Let us observe the doctrine touching warranty of title, under the two principal heads of, (1), Ancient warranty; and (2), Modern covenants of title;

W. C.

1^a. Ancient Warranty.

The topics to be adverted to in connection with ancient warranty, are (1), The form of the ancient warranty; (2), The several kinds of ancient warranty; (3), The doctrine touching the effect of warranty at common law in *rebutting* the claim of the warrantor or his heirs; and (4), The remedies whereby covenant warranty is made available. (2 Bl. Com. 300 & seq; 2 Lom. Dig. 317-'18; 2 Insts. Com. & Stat. Law, 631, &c.)

W. C.

1^b. Form of the Ancient Warranty.

The covenant-real of ancient warranty is created *exclusively* by the word "*warrantizabo*." *Ang.*, "will warrant," and no paraphrase or substitute is admitted. "I will warrant *and defend*," or "I *covenant* to warrant," &c., do not make an ancient warranty, but constitute a *modern covenant of title*. (2 Bl. Com. 201; 2 Insts. Com. & Stat. Law, 632; *Tabb v. Binford*, 4 Leigh, 132.)

2^b. The several kinds of Ancient Warranty; W. C.1^a. Lineal Warranty.

Lineal warranty is where the warranty descends in the *same line with the land*, i. e. from the *same ancestor*. (2 Bl. Com. 301; 2 Institutes Com. & Stat. Law, 633.)

2^a. Collateral Warranty.

Collateral warranty is where the warranty *does not come from the same ancestor* from whom the lands *would have descended*, but descends in a line *collateral*

to that of the land. (2 Bl. Com. 301; 2 Lom. Dig. 324; 2 Insts. Com. & Stat. Law, 633.)

3^d. Warranty *Commencing by Disseisin*.

Warranty commencing *by disseisin* is where the very conveyance to which the warranty is annexed, immediately follows a disseisin, or itself operates as such; as where a father tenant for years, remainder to his son, in fee, alienes in fee-simple with warranty. Such warranty is not binding upon any heir of such tortious warrantor; for it cannot be presumed that an ancestor unjust enough to do such a wrong will be so just as to leave a recompense to his heir. It will be observed that warranty by disseisin is, in all cases, *collateral*. (2 Insts. Com. & Stat. Law, 638.)

3^d. The Doctrine touching the Effect of Warranty at Common Law, in *Rebutting* (i. e. *Repelling*) the claim of the Warrantor's Heirs; W. C.

1st. Doctrine touching the Effect of *Lineal Warranty* at Common Law.

The effect of lineal warranty at common law, is to *rebut* or *repel* the claim of the heirs of warrantor to the land in *all cases*, whether they have assets by descent from the warranting ancestor or not; for if they should recover the land in question, they then would have assets, and so to avoid a needless circuity of action, the warranty is allowed to *repel* the claim of the heir. (2 Bl. Com. 302; 2 Insts. Com. & Stat. Law, 634.)

2^d. Doctrine touching the Effect of *Collateral Warranty*; W. C.

1st. Doctrine at Common Law.

The effect of collateral warranty at common law, is also to *rebut* or *repel* the *claim* of the warrantor's heirs, in *all cases*, whether any heritage descends *from the warrantor or not*. (2 Bl. Com. 302; 2 Insts. Com. & Stat. Law, 634.)

The best explanation of this anomaly that can be given may be seen, 2 Insts. Com. & Stat. Law, 634.

2^d. Modifications by Statute in England of the Common law Doctrine.

See 2 Bl. Com. 302-'3; 2 Insts. Com. & Stat. Law, 635;

W. C.

1st. Stat. Gloucester, 6 Edw. I, c. 3. (A. D. 1278.)

This statute is applicable to *tenants by the curtesy* aliening their estate in fee-simple with warranty, and provides that the heir of the wife shall not be

repelled by the father's warranty, except to the extent of the heritage received from him.

2^l. Stat. 11 Henry VII, c. 20, (A. D. 1496.)

Applicable to *Tenants in Dower*; making a similar provision as the statute of Gloucester, 6 Edw. I, c. 3.

3^l. Stat. 4 and 5 Anne, c. 16, (A. D. 1706.)

Applicable to any *tenant for life*, making a similar provision as the statute of Gloucester, 6 Edw. I, c. 3.

4^l. Stat. 3 and 4 Wm. IV, c. 27 and 74, (A. D. 1834.)

Abolishing all warranties (that is, the *ancient warranty*, or covenant real.)

3^k. Modification by Statute in Virginia of Effect of Collateral Warranty.

When the deed of the alienor mentions that he and his heirs will warrant what it purports to pass or assure, if *anything descends* from him, *his heirs shall be bound* for the value of what is so descended, or *liable* for such value. (V. C. 1873, c. 112, § 7; *Urquhart v. Clarke*, 2 Rand. 549.)

4^h. Remedies whereby *Ancient Warranty* is made available.

1^l. The nature of the Several Remedies; W. C.

1^k. Rebutter.

To rebut or repel the *claim of the grantor or his heirs* to the subject-matter. (2 Bl. Com. 302; 2 Insts. Com. & Stat. Law, 636.)

2^k. *Warrantia Chartæ*.

The writ of *warrantia chartæ* is an action whereby to ascertain by judicial inquiry the vendor's obligation to warrant the title to lands sold by him, and to charge his lands *with a lien therefor*, subject to be made available afterwards, when the vendee is sued for the land, by means of *voucher to warranty*; or if voucher to warranty lies not, then *warrantia chartæ* is an independent remedy. (2 Lom. Dig. 325; 2 Insts. Com. & Stat. Law, 637.)

3^k. Voucher to Warranty.

A voucher to warranty (*vocatio*) is a *summons* to the vendor, when the vendee is sued for the land, to make good his warranty, and fulfil its stipulations, whereupon, if vendor's obligation to warrant be admitted or proved, and claimant recovers the premises of the vendee, the latter recovers over *land* of equal value of the *vouchee* (*the warrantor*.) (2 Th. Co. Lit. 304 & n. (64), 2 Insts. Com. & Stat. Law, 637; 2 Lom. Dig. 325.)

Voucher to warranty is practically abolished in Virginia, along with the *writ of right*, to which it was chiefly incident. (V. C. 1873, c. 131, § 38.)

2^l. Mode and Measure of Recovery upon Ancient Warranty.

The *mode* of the recovery is *not in money*, as in the modern *covenants of title*, but *in lands*; and the *measure* of recovery is lands of the value which those lost by the paramount title of the claimant bore, at the *date of the warranty*. (2 Lom. Dig. 325-'26; 2 Insts. Com. & Stat. Law, 636-'7.)

3^l. In favor of and against whom Remedies on Ancient Warranty are available.

Against the *warrantor and his heirs*, in favor of the *warrantee, his heirs and assigns*. (2 Th. Co. Lit. 307 & seq; McCleneham v. Gwynn, 3 Munf. 556; Farmer's Bk. v. Mut. Assur. Soc., &c., 4 Leigh, 69; Dickinson v. Hoome's Adm'r, 8 Grat. 353.)

2^s. Modern Covenants of Title.

Modern covenants of title are such covenants as are used in modern times, in lieu of the ancient warranty, in order to oblige the vendor to answer for any defect in the title. (2 Bl. Com. 304; 2 Lom. Dig. 343, &c.; 2 Insts. Com. & Stat. Law, 638 & seq.)

W. C.

1^h. Form of Modern Covenants of Title.

Any words which convey the idea designed, except only the word "*warrant*" by itself, or with the auxiliaries "*shall*" or "*will*." The word "*warrant*" is *appropriated* in law, to express the *ancient warranty*, and not a modern covenant of title. But the phrase "*to warrant and defend*" or "*covenant to warrant*," &c., constitutes a modern covenant. (2 Insts. Com. & Stat. Law, 641; 2 Lom. Dig. 318, 321, 343; Tabb v. Binford, 4 Leigh, 132; V. C. 1873, c. 113, § 9, &c.)

2^h. Several Sorts of Modern Covenants of Title; W. C.

1^l. Nature of the Covenant in respect of the Persons to whose claims it relates; W. C.

1^h. Covenant of General Warranty.

A covenant of general warranty is a covenant against the claims of *all persons whatsoever*. (V. C. 1873, c. 113, § 10, 12.)

2^h. Covenant of Special Warranty.

A covenant of *special warranty* is a covenant against the claims of certain *designated persons only*, *e. g.*, of the grantor and his heirs. (V. C. 1873, c. 113, § 11, 12.)

2^d. Nature of the Modern Covenants of Title *in respect of the Defects of Title* against which they stipulate ; W. C.

1st. The Covenant of Title *usual in Virginia*, and in the South and West generally.

That the grantor will warrant and defend the title to the land against the claims of all persons. (2 Insts. Com. & Stat. Law, 642 ; V. C. 1873, c. 113, § 10, 12)

The objections to this covenant (and they are strong ones,) are (1), That it is *vague and indefinite* in meaning, it not being certain whether it applies as well to a failure on the part of the vendee to *get possession*, as to a *loss of possession*, by eviction afterwards, or to the latter alone ; and (2). That it is certainly not applicable unless and until the vendee is deprived of or disturbed *in the possession* ; so that, although there is a total failure of title, yet if the adverse claimant does not interfere with his *possession*, he cannot sue upon the covenant. (2 Lom. Dig. 355 '6 ; 2 Insts. Com. & Stat. Law, 642.)

2nd. The Proper Covenants of Title *usual in England*, and expedient every where.

See 2 Lom. Dig. 343 & seq ; 2 Insts. Com. & Stat. Law, 641, 643 & seq ; V. C. 1873, c. 113, § 13 to 16.

W. C.

1st. That the Grantor is seised *in Fee-Simple*.

2^d. That the Grantor has *full power and lawful right* to convey the land *in Fee-Simple*.

See V. C. 1873, c. 113, § 13.

3^d. That the Grantee and his Heirs and Assigns *shall have quiet Possession*.

See V. C. 1873, c. 113, § 14.

4th. That the Premises are *free from all Incumbrances*, by Mortgage, Judgment, or otherwise.

See V. C. 1873, c. 113, § 14, 16.

5th. That the Grantor will, from time to time, execute such *further assurances*, as by the advice of counsel, shall be *reasonably required*.

See V. C. 1873, c. 113, § 15.

3^d. Remedies upon the Modern Covenants of Title ; W. C.

1st. Nature of Remedy ; W. C.

1st. Rebutter.

Rebutter is the repelling of the claim and of the action of the vendor or his heirs, by a plea of the warranty, just as in the case of ancient warranty. (*Ante* p. 40 : 2 Insts. Com. & Stat. Law, 636 ; 2 Th.

Co. Lit. 246; 2 Jac. Law Dict. Rebutter; V. C. 1873, c. 112, § 7; Urquhart v. Clarke, 2 Rand. 534.)

2^a. Personal Action of *Covenant*, and in some cases *Bill in Equity*.

See 2 Insts. Com. & Stat. Law, 650.

2ⁱ. Mode and Measure of Recovery upon Modern Covenants of Title.

The recovery is *in money*; and the *measure* is the value of the land at the *date of the covenant*, &c. (2 Insts. Com. & Stat. Law, 650.)

7ⁱ. Conclusion of Deed of Conveyance, including Date.

The *date* of a deed (*datum*) is properly the time when it is *delivered* (*given*). That is, *prima facie*, the time mentioned in the deed itself; but the *true date* is the time of delivery. (2 Bl. Com. 304; 2 Insts. Com. & Stat. Law, 651.)

The doctrine touching the *sealing* and the *delivery* of a deed of conveyance may be seen in 2 Insts. Com. & Stat. Law, 651 & seq; 655 & seq; and that relative to the legality of the *consideration* therefor, in 2 Insts. Com. & Stat. Law, 589 & seq.

4^o. The Several Sorts of Conveyance by *Matter in Pais*; W. C.

1ⁱ. Conveyances at, and Operating by Force of, the Common Law; W. C.

1^a. Primary or Original Conveyances.

The primary or original conveyances, (so called because by them the benefit or estate is created, or first arises), are (1), Feoffment; (2), Gift; (3), Lease; (4), Grant; (5), Exchange; and (6), Partition. (2 Bl. Com. 310; 2 Insts. Com. & Stat. Law, 669 & seq;) W. C.

1^b. Feoffment.

A feoffment is a conveyance of *land in fee-simple*, although often inaccurately used to express the transfer of a less estate, as (*e. g.*) *for life*. The appropriate words for a feoffment are "*give, grant and enfeoff*," but they are not necessary words of art, and any other expressions which convey the idea clearly that the land is intended to pass in *fee-simple* will suffice. A feoffment, like all other conveyances of the *freehold in lands*, must be accompanied at common law, by *livery of seisin*, that is, by the *actual delivery* of the possession of the freehold by the grantor to the grantee. (2 Insts. Com. & Stat. Law, 669 & seq; 675.)

2^b. Gift.

A gift is a conveyance of lands in *fee-tail*; and as that also is an estate of *freehold*, it must be accom-

panied, in order to operate as a *gift*, by *livery of seisin*. The appropriate words for a gift of lands are "*give and grant*;" but they are not words of art, and may be substituted by any other expression which conveys the idea that the lands are designed to be conveyed in *fee-tail*. (2 Insts. Com. & Stat. Law, 676.)

3^h. Lease.

A lease is a conveyance which out of a larger estate creates an estate *for life, for years, or at will*. If it be for life, which is a *freehold*, the lease requires *livery of seisin* in order to perfect it. The appropriate words of a lease are "*demise, lease, and to farm let*," but they are not exclusive of other words which convey the same idea. (2 Insts. Com. & Stat. Law, 676, & seq.; 2 Bl. Com. 317-'18.)

4^h. Grant.

A grant is a conveyance of *incorporeal hereditaments*, such as rights of common or of way, franchises, &c. These, in their nature, are insusceptible of *livery of seisin*, and pass *by grant alone*. They are said, therefore, to *lie in grant*, as at common law, lands as to the *immediate freehold*, are said to *lie in livery*. The necessary instrument of a grant is a *deed*. The appropriate words are "*give and grant*," but they are by no means exclusive or indispensable. (2 Insts. Com. & Stat. Law, 701, & seq.)

The statute of grants (8 & 9 Vict. c. 106, A. D. 1845), and our corresponding statute (A. D. 1850), declares that all lands, as to the *immediate freehold* thereof, shall be deemed to *lie in grant* as well as *in livery*. (V. C. 1873, c. 112, § 4; 2 Insts. Com. & Stat. Law, 703.)

5^h. Exchange.

An exchange is a mutual interchange of lands, one parcel for another, the *estate* or interest of the parties in their respective tracts or parcels being *the same*. The word *exchange* is a word necessary to constitute the transaction. No paraphrase or substitute will avail. To an exchange *no livery of seisin* is requisite, although the subject were an estate of freehold, but only an *entry* on both sides. If, therefore, the word *exchange* were not employed, as the conveyance would not be of this character, if it related to a freehold, it would require *livery of seisin*, in order to be operative at common law. (2 Insts. Com. & Stat. Law, 704; 2 Th. Co. Lit. 446, 448, n. 14.)

6^h. Partition.

A partition is a division of a tract or parcel of land, belonging to several persons in conjunction, either as

joint-tenants or tenants in common. A partition between *co-parceners*, that is *co-heirs*, is not properly a conveyance.

In the case of *joint-tenants*, a partition must be evidenced by deed, mutual livery of seisin being impracticable when parties are already seised, as joint-tenants are, of the whole and of every part of the subject. As between *tenants in common*, partition must at common law be accompanied by *mutual livery of seisin* in case of freeholds, but no deed or writing is required; and in case of *terms for years*, it is believed that it may be effected by *parol merely*. By the Statute of Frauds, (29 Car. II, c. 3, § 1, 2, 3) a deed is required wherever the estate exceeds three years. And so in Virginia, a deed is necessary for a partition between joint-tenants and tenants in common, wherever the estate exceeds five years. (V. C. 1873, c. 112, § 1; 2 Insts. Com. & Stat. Law, 705 & seq.)

2^d. Derivative or Secondary Conveyances.

The derivative or secondary conveyances (so called because they suppose some prior transaction touching the same subject between the same parties, or by one of them,) are, (1), Release; (2), Surrender; (3), Confirmation; (4), Assignment; and (5), Defeazance. (2 Bl. Com. 324, &c.; 2 Insts. Com. & Stat. Law, 706 & seq.) W. C.

1^h. Release; W. C.

1ⁱ. Nature of a Release.

A release is the *discharge of a man's right*. In conveyancing, it is the *discharge of a man's right in lands and tenements*. (2 Inst. Com. & Stat. Law, 706 & seq.)

2ⁱ. Modes in which a Release operates as a Conveyance; W. C.

1^k. Release enuring by way of *Passing a Right*; (*De mitter le Droit*); W. C.

1ⁱ. Release by *Disseisee to Disseisor*.

See 2 Insts. Com. & Stat. Law, 707 & seq.

2ⁱ. Release by *Disseisee to one of two joint Disseisors*.

The disseisor, to whom the release is made, becomes *rightfully seised of the whole*, and shall hold his fellow out as effectually as if the disseisee had entered on both disseisors, turned both out of possession, and then *enfeoffed* the one of them with livery of seisin. Hence, this instance of release is said to enure *by way of entry and feoffment*; but in fact it is simply an instance of a release enuring *by way of passing a right*. (2 Insts. Com. & Stat. Law, 708.)

3^l. Release by Disseisee to *one of two joint Feoffees of a Disseisor.*

In this case the release *enures to both*; for they both came in by a notoriety *prima facie* legal; to wit the *feoffment*. (2 Insts. Com. & Stat. Law, 708-'9.)

2^k. Release enuring by way of *Passing an Estate*; (*De mitter l'Estate.*)

Where joint-tenant releases his interest to another, he thereby passes to him *his share of the joint-estate*, and the release is said to enure by way of passing an estate. One joint-tenant cannot at common law, convey his share to another by feoffment with livery, because each joint-tenant is seised *of the whole, and of every part* of the land; and, therefore, it would be impossible for one to deliver to the other that which he already has. (2 Insts. Com. & Stat. Law, 709.)

3^k. Release enuring by way of *Enlarging an Estate*; (*D'Enlargir l'Estate.*)

An instance of a release enuring by way of enlarging an estate is where a reversioner or landlord releases his reversion to the tenant in possession, and so enlarges the latter's estate to the compass indicated by the terms of the release. (2 Insts. Com. & Stat. Law, 710 & seq.)

4^k. Release enuring by way of *Extinguishing a Right*. (*D'Extinguisher le Droit.*)

A release enures to *extinguish a right*, because, under the circumstances, it *cannot pass the right*, and so, *ut res valeat*, it is construed to *destroy or extinguish it*.

A release *cannot pass a right*, and therefore, operates to extinguish it, in these several cases, viz: (1), Where the releasee is *not in possession of the land*; and (2), Where the releasee cannot take what to him is released *without a manifest incongruity*, such as that he shall be at once the payee of money and the receiver of it. (2 Insts. Com. & Stat. Law, 711.)

2^h. Surrender.

A surrender (*sursum-redditio*), or *rendering up*, is of a nature directly *opposite to a release*; for, as a release is the *discharge of a right*, mostly to one in possession, so a *surrender* is the yielding up of the *possession* to him who has the outstanding right. The landlord releases his reversion to the tenant; the tenant *surrenders* his possession to the landlord. (2 Insts. Com. & Stat. Law, 712 & seq.)

3^h. Confirmation.

Confirmation is a conveyance of an estate or right *in esse*, whereby a voidable estate is made *sure and unavoidable*; and whereby a particular estate is *increased*, *e. g.*, when tenant *for life* leases for forty years, and reversioner before the death of the life-tenant, *confirms* the estate of the lessee for years. (2 Insts. Com. & Stat. Law, 716 & seq.)

4^h. Assignment.

An assignment (regarded as a *conveyance* touching lands), is usually applied to the transfer of an estate for life or years which has been *already created*. (2 Insts. Com. & Stat. Law, 718 & seq.) Thus, if a tenant for years, or a tenant for life, proposes to transfer his *whole interest*, he does it by an *assignment*.

5^h. Defeazance.

A defeazance is a collateral deed, made at the same time with a feoffment, or other conveyance, containing mention of *certain conditions*, upon the performance or non-performance of which the estate then created *may be defeated*. (2 Insts. Com. and Stat. Law, 724-'5.)

2^f. Conveyances Operating by the force and effect of Statutes.

There are two statutes (besides the *statute of wills*, which is reserved for a separate head), by virtue of which conveyances may operate in a manner unknown to the common law, viz: (1), The Statute of *Uses*, 27 Hen. VIII, c. 10, (A. D. 1536); and (2), The Statute of *Grants*, 8 and 9 Vict. c. 106, (A. D. 1845); both of which statutes exist in Virginia, the first, however, with considerable modifications. (V. C. 1873, c. 112, § 14, 4);

W. C.

1st. Conveyances Operating by Virtue of the Statute of Uses.

See V. C. 1873, c. 112, § 14; 2 Insts. Com. & Stat. Law, 840 & seq.

The purpose and design of the Statute of Uses, (27 Hen. VIII, c. 10), was to *abolish uses altogether*. The statute declares, in substance, that wherever one person is *seised* of any lands or tenements *to the use of another*, by *any ways or means whatsoever*, the *possession* of him who is *seised* shall be deemed *to be transferred* to him who *has the use*, (called the *cestui que use*), for the *estate or interest* which he has *in the use*, as fully and effectually as if he had been *enfeoffed with livery of seisin of the land*. The courts of England, however, determined that there were *three classes* of cases wherein the statute, comprehensive as it was, failed to transfer the possession to the use, and that in those cases, therefore, the uses remained as before the statute, being cognizable and pro-

tected in the court of chancery, under the designation of *trusts*. Those classes of cases were as follows:

(1), Cases of a *Use upon a Use*.

e. g. : Bargain and sale to the *use of A*, to the *use of Z*. The statute transferred the possession of the bargainor to A, but not from A to Z, so that Z had only a *use* as before the statute, it being now known as a *trust*.

(2), Cases where a *discretion* was vested in the *person seised*, that is, in the *trustee*.

e. g. : Bargain and sale to the use of A, the bargainor to *continue in possession, manage the estate, receive the rents and profits*, and pay them annually to A. Here the whole object of the transaction would have been frustrated had the statute operated to *vest the possession* in A. It was, therefore, held that in this case also, the use was *unexecuted*, and that A had only a *use* as before the statute, only it was now called a *trust*.

(3), Cases where the person in possession *had not a freehold*, and, therefore, was *not seised*.

e. g. : Bargain and sale by a tenant for *fifty years to use of A*. In this case, the bargainor not being *seised*, the statute in *its terms* did not apply; so that A had a *use*, as before the statute, under the name of a *trust*. And to these we must add in Virginia, a *fourth class*, namely:

(4), Cases where the use is created in *some other mode* than by *bargain and sale, covenant to stand seised, and lease and release*.

The statute of uses having thus failed of its principal object, has been chiefly employed to *give effect to conveyances*, by substituting a *constructive livery of seisin* for an *actual one*, thus operating to transfer *statutorily* the possession of him who is *seised of the land*, to him who *has the use* in the same, for the estate which *he has in the use*;

W. C.

1^a. Conveyances under the Statute of Uses, (27 Hen. VIII, c. 10,) operating with *transmutation of the possession*.

e. g. : Feoffment with livery of seisin of Black-acre by A to Z and his heirs, to the *use of W and his heirs*. (2 Insts. Com. & Stat. Law, 728-'9, &c.)

The statute of uses in Virginia is more limited in its terms than 27 Hen. VIII, c. 10, not applying to uses created by *any way and means whatsoever*, but only to those raised by *bargain and sale, covenant to stand seised, and lease and release*, which last is only a form of bargain and sale. (V. C. 1873, c. 112, § 14.) There is,

therefore, under our statute, no such thing as a conveyance operating with *transmutation of possession*. (Bass v. Scott, 2 Leigh, 356.) And thus we have, as we have seen, a *fourth class* of cases, besides the three acknowledged in England, where the use is unexecuted by the statute, and remains still *a use*, under the name of *trust*.

2^h. Conveyances under the Statute of Uses, (27 Hen. VIII, c. 10 ; V. C. 1873, c. 112, § 14), operating *without transmutation of the possession* ; W. C.

1^l. Conveyances by way of *Bargain and Sale* for *valuable consideration*.

e. g. : A, the owner of the land, bargains for *valuable consideration* to stand seised of Black-acre, *to use of W and his heirs forever*. A *use in fee-simple* in Black-acre being raised by the bargain in W, the statute transfers *A's seisin* to W *in fee-simple*. (2 Insts. Com. & Stat. Law, 737 & seq ; 746-'7.)

The common form of a deed of *bargain and sale* somewhat disguises this *modus operandi*. The deed sets forth that the grantor, "in consideration of — dollars, to him in hand paid, at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, doth *give, grant, bargain, and sell* unto the said grantee, his heirs and assigns forever, all that certain tract or parcel of land," &c. The effect and operation, however, is as above explained.

2^l. Conveyances *by way of covenant to stand seised*, in consideration of *Natural Love and Affection*.

e. g. : A, the owner of Black-acre, covenants *with his son W*, to stand seised of the land, *to the use of W and his heirs forever*, in consideration of *natural love and affection*. (2 Insts. Com. & Stat. Law, 732 & seq ; 747.)

3^l. Conveyances *by way of Lease and Release*.

e. g. : A, the owner of Black-acre, *bargains for valuable consideration*, to stand seised of Black-acre, to the use of W, *for a year*, and then (W being *statutorily* in possession of the land for a year,) A makes a release, *enuring by way of enlargement*, to W and his heirs. (2 Insts. Com. & Stat. Law, 733 & seq ; 747.)

2^s. Conveyances Operating by *Virtue of the Statute of Grants*.

The statute of grants (8 & 9 Vict. c. 106, A. D. 1845,) revolutionizes the common law theory of conveyances of *freehold estates* in lands, by declaring that all real estate shall, as regards the conveyance of the *immediate freehold* thereof, be deemed to *lie in grant*, as well as in *liv-*

ery. We adopted a similar provision in Virginia in 1850. (V. C. 1873, c. 112, § 4; 2 Insts. Com. & Stat. Law, 748-'9.)

Commonwealth's grants, and king's grants, have always operated in a mode analogous to that provided by the statute of grants, the title passing, as in the case of incorporeal property, merely by the *effect of the grant*. (V. C. 1873, c. 108, § 52; Id. c. 109, § 23.)

Since the enactment of the statute of uses, and the statute of grants, an effect is sometimes given to conveyances intended to operate at common law, as if they had been made under those statutes respectively. This results from the established maxim, that every deed and transaction ought to be construed, if possible, so that it may have *some effect rather than none at all*,—*ut res valeat majusquam pereat*. Thus, in *Rowletts v. Daniel*, 4 Munf. 473, a grantor made what he designed as a *deed of feoffment*, stating that it was for *valuable consideration*; but he omitted to make *livery of seisin*. It was held that although, *for want of livery*, it could not operate as a *feoffment*, as was designed, yet that, *ut res valeat*, &c., it should operate as a *bargain and sale*. And in *Watts v. Cole*, 2 Leigh, 662, it was held, in like manner, that a deed designed to operate as a *feoffment*, but which failed of effect for *want of livery*, might operate as a *covenant to stand seised*, a consideration of natural love and affection having been expressed in it. So, by parity of reason, where the deed could not operate under the statute of uses, for want of the requisite consideration, it would be good under the *statute of grants*, which requires no consideration at all, as between the parties. (2 Insts. Com. & Stat Law, 748-'9.)

5°. The Manner of Executing Conveyances; W. C.

1°. The Mode of Executing Conveyances, and of Authenticating them for Registry, where the grantor is *sui juris*.

See V. C. 1873, c. 113, § 1, &c.; Id. c. 114, § 5; Id. c. 117, § 2, 3.

2°. The Mode of Executing Conveyances, and of authenticating them for Registry, when the Grantor is a *Married Woman*.

See V. C. 1873, c. 117, § 4, 5, 7; 2 Insts. Com. & Stat. Law, 576, & seq; Id. 582.

W. C.

1°. Doctrine Applicable to Conveyances of Married Women.

The directions of the statute (introducing as it does an *exception* to the general doctrine of the disability of married women), must be *strictly observed*. (2 Insts. Com. & Stat. Law, 582.)

2^o. Principles to be Observed in Transactions under the Statute by *Married Women*; W. C.

1^h. Statute applies *Exclusively* to *Conveyances of Lands and Chattels*.

See 2 Insts. Com. & Stat. Law, 582.

2^h. Husband *must be a Party* as well as the Wife.

See 2 Insts. Com. & Stat. Law, 582.

3^h. Husband and Wife *must both sign the deed*.

See 2 Insts. Com. & Stat. Law, 582.

4^h. Privy Examination of Wife *must appear* from the Certificate of the Examining Functionaries.

See 2 Insts. Com. & Stat. Law, 582.

5^h. An Explanation of the Writing *must appear from the Certificate*, to have been made to the Wife.

See 2 Insts. Com. & Stat. Law, 582.

6^h. No prescribed Requisite *must be omitted* in the Certificate of the Examining Functionaries.

See 2 Insts. Com. & Stat. Law, 582.

7^h. No other Disability in the Married Woman is obviated save that of Coverture.

e. g.: Not that of Infancy, &c., (2 Insts. Com. & Stat. Law, 582.)

8^h. Writing *must be Recorded*.

See 2 Insts. Com. & Stat. Law, 847.

In order to transfer or bar the wife's right of dower, when she is *insane*, the discretion is committed to the circuit, county, or corporation court (doubtless in *Chancery*), to determine the propriety, with a view to her interest and that of her family, of relinquishing her dower; and if the court deem it proper, it may appoint a commissioner to make it in her behalf. (V. C. 1873, c. 124, § 11). Where the *husband* is *infant* or *insane*, resort is also had to a court of equity to protect the wife. (2 Insts. Com. & Stat. Law, 840-'41.) But no provision is made for the wife's infancy.

6^o. The most Usual Forms of Conveyance.

See 2 Insts. Com. & Stat. Law, 675, note (a), 824 & seq; Grayd. Forms, 294 & seq; Tate & Sands' Amer. Forms, 186 & seq; First Appendix to this work.

7^o. The Registry of Deeds of Conveyance; W. C.

1st. The Policy of the *Registry Laws*.

The policy of registry-laws is to give notice (through the public records of the court of registry), to whom it may concern, of whatever may affect the *title to lands*, and of a few transactions which affect the *title to chattels*; and to invalidate all such transactions relating to either subject, *as to creditors*, and *subsequent purchases for value and without notice*, (*but not as to the parties*), until and except they shall be recorded. (V. C. 1873, c. 114, § 5, &c.)

- 2^d. The Cases embraced by the Registry Laws.
 See V. C. 1873, c. 114, § 4, 5; Id. c. 117, § 1-4; Id. c. 114, § 11, 12; 2 Insts. Com. & Stat. Law, 850.
 W. C.
- 1st. Contracts of *Marriage Settlement*, whether as to *Lands or Chattels*.
 See V. C. 1873, c. 114, § 4, 5.
- 2nd. Contracts to Convey *Lands, or Terms therein of more than five years*.
 See V. C. 1873, c. 144, § 4, 5.
- 3rd. Conveyances of *Lands or of Terms therein of more than five years*.
 See V. C. 1873, c. 114, § 5.
- 4th. Deeds of *Gift*, and Deeds of *Trust or Mortgage*, conveying *Real Estate, or Goods and Chattels*.
 See V. C. 1873, c. 114, § 5.
- 5th. Mechanics' *Liens for Erecting or Repairing Buildings*.
 See V. C. 1873, c. 115, § 2, 3 & seq; *Iage v. Bosieux*, 15 Grat. 83.
- 6th. Partitions, Assignments of Dower, and Recovery of *Lands, by Judgment or Decree*.
 See V. C. 1873, c. 159, § 15.
- 7th. Judgment or Decree for the Payment of Money.
 See V. C. 1873, c. 182, § 1, 4, 6, 8.
- 8th. *Lis Pendens*, and Attachment touching Real Estate.
 See V. C. 1873, c. 182, § 5.
- 9th. Loans of Goods and Chattels, where Possession remains with Loanee *over five years*; and Limitations in *futuro* of Chattels.
 See V. C. 1873, c. 114, § 3.
- 10th. Agreements in Writing, creating a lien on Crops *to be made*, in order to *secure Advances, &c.*
 See V. C. 1873, c. 115, § 12, 13.
- 2^d. Conveyances by *matter of Record*; W. C.
- 1st. Conveyances by *Private Act of the Legislature*; W. C.
- 1st. Cases wherein Private Acts are resorted to as a Mode of Assurance.
 See 2 Bl. Com. 344; 2 Lom. Dig. 495 & seq; 2 Insts. Co. & Stat. Law, 892-'3;
 W. C.
- 1st. Cases of Title entangled by *complex Limitations*:
e. g.: By means of contingent remainders, resulting trusts, and executory limitations; so that the owner can neither sell nor fully enjoy the property. (See V. C. 1873, c. 112, § 20 to 24.)
- 2nd. Cases wherein the Life-Tenant in Family Settlements is *abridged of some needful power*, as in respect of making long leases, &c.

e. g.: Leases to extend beyond his own life.

3^d. Cases of *Family Settlements*, in order to guard against claims of Infants, Lunatics, &c.

See V. C. 1873, c. 124, § 1, 2 & seq.

2^d. Use of *Private Acts of the Legislature in Virginia*.

Private acts have not been much used in Virginia since the abolition of estates-tail, October 7, 1776, (V. C. 1873, c. 112, § 9); the statute committing to the circuit and corporation courts in *chancery* the power of selling the lands of infants, lunatics, &c., when it shall be proved to be for their benefit to do so, (1st January, 1820, V. C. 1873, c. 124, § 1 to 12); and the statute authorizing the circuit and corporation courts in chancery to direct the sale of all *contingent interests*, (Mar. 15, 1858, V. C. 1873, c. 112, § 20 & seq; 2 Insts. Com. & Stat. Law, 206, 362.) And the Constitution of 1869, (following that of 1851,) discourages, if it does not inhibit, such legislation. (Va. Cont. 1869, Act V, § 20; 2 Insts. Com. & Stat. Law, 894-'5,) apparently designing that whenever a case occurs demanding special relief, a general law shall be enacted for that and for *all similar exigencies*, and leaving it to be applied by the courts in each instance.

3^d. Mode of Enacting Private Acts of the Legislature, in order to guard against Abuse.

See 2 Bl. Com. 345; 1 Do. 181-'2; 2 Lom. Dig. 499; 2 Insts. Com. & Stat. Law, 893-'4;

W. C.

1st. Reference to Judges in England, to inquire as to the Propriety of the Act.

In Virginia, the reference is not to the judges, but to a committee of either house of the General Assembly.

2nd. Consent of Parties who are in being, and capable to consent.

3rd. Equivalent provided for Parties who are not *sui juris*.

4th. General Saving of Rights of all Persons not Consenting.

5th. Relief against Private Acts, if procured by Fraud.

This relief is afforded in a *court of equity*. (2 Bl. Com. 346; 2 Lom. Dig. 500; Spotswood v. Pendleton, 4 Call. 520, &c.; 2 Insts. Com. & Stat. Law, 894.)

2nd. Commonwealth's or King's Grants; W. C.

1st. General Principles Applicable to such Grants.

See 2 Bl. Com. 346; 1 Tuck. Com. (B. II,) 272; 2 Lom. Dig. 500 & seq; 2 Insts. Com. & Stat. Law, 895 & seq.

W. C.

1st. No *Freehold Estate* in Lands can pass to or from the Commonwealth or Crown save by *Matter of Record*.

2^s. Can be Founded in the United States, only on some General or Special Act of the Legislature.

2^f. Construction of such Grants

See 2 Bl. Com. 347; 2 Lom. Dig. 501-'2; 2 Insts. Com. & Stat. Law, 896-'7, &c.

W. C.

1^s. Taken most Beneficially for the Commonwealth or Crown, *unless Founded on Valuable Consideration*.

Words which are ambiguous are to be construed most strongly against *him who uses them*, in order to hold out to him the strongest inducement to express himself with clearness. Hence, in general, the maxim prevails, *verba chartarum fortius accipiuntur contra proferentem*,—a deed shall be construed most strongly *against the grantor*. (Broom's Max. 456.) But in the case of the Commonwealth or Crown, supposing the grant to be *gratuitous*, the words are in truth the words of the *grantee*, only echoed back by the sovereign. It is, therefore, no exception to the *principle* of the maxim, but on the contrary is in pursuance of it, that all king's or Commonwealth's grants shall be construed, when *without valuable consideration*, most beneficially for the Crown and Commonwealth. If founded on valuable consideration, the words are supposed to be the words of the *sovereign grantor*, and the grant is construed like the grants of individuals, most favorably to the grantee. (2 Insts. Com. & Stat. Law, 897.)

2^s. Include no *Incidents*—only what is Expressed.

This is believed to be founded on the same consideration as 1^s; and if so, it is limited to *gratuitous* grants of the Crown and the Commonwealth.

3^s. In cases of *Mistake, False Suggestion, or Illegality*, the Grant is void.

See 2 Insts. Com. & Stat. Law, 897.

3^f. Mode of Proceeding to Obtain Grants from the Crown and the Commonwealth; W. C.

1^s. Mode of Proceeding in England.

See 2 Bl. Com. 347 & seq.

2^s. Mode of Proceeding in Virginia.

In *practice*, the sole subject of Commonwealth's grants, with us, is *waste and unappropriated lands*, although, of course, the Legislature might grant anything belonging to the Commonwealth. (2 Lom. Dig. 502 & seq; 2 Insts. Com. & Stat. Law, 898.)

W. C.

1^b. Steps to obtain in Virginia a Grant for Waste and Unappropriated Lands.

See 2 Lom. Dig. 502, &c.; 2 Insts. Com. & Stat. Law, 3, 898-'9.

W. C.

1¹. Warrant.

The first step is to obtain a *warrant* from the *register* of the land office, empowering the party to claim and appropriate the number of acres mentioned in the warrant, of waste and *unappropriated lands*, belonging to the Commonwealth, *wherever he can find them*. (2 Insts. Com. & Stat. Law, 898 & seq.)

W. C.

1². Pay State Treasurer \$1 per acre.

See V. C. 1873, c. 39, § 1.

2². Deliver Treasurer's Receipt to First Auditor, and get his Certificate.

See V. C. 1873, c. 39, § 1.

3². Deliver Auditor's Certificate to Register of Land Office, *who issues the Warrant*.

See V. C. 1873, c. 108, § 4.

2¹. Entry or Location, by *designated Limits*, in the Book of the County-Surveyor of that county wherein Waste &c. Lands are supposed to be.

The *location* or *entry* is required to be made with such *definite certainty* of description that others may locate their warrants on the *adjacent residuum*, if any remains unappropriated. (V. C. 1873, c. 108, § 6; 2 Lom. Dig. 503 & seq; 2 Insts. Com. & Stat. Law, 389.)

3¹. Survey by County-Surveyor *returned to the Land Office*.

See V. C. 1873, c. 108, § 17; 2 Lom. Dig. 507 & seq.

4¹. Grant or Letters-patent.

The grant or letters-patent (*patent* it is customary to call it), runs in the name of the Governor (purporting, however, that the grant emanates from the Commonwealth); is witnessed by his signature, and by the seal of the Commonwealth affixed; is registered in the Land Office, by the Register, and certified by him as so registered, and is then delivered to the grantee or his order. (V. C. 1873, c. 108, § 52-'3 &c.; 2 Lom. Dig. 513 & seq.; 2 Insts. Com. Stat. 3, 899.)

The form of the grant is prescribed by the statute, (V. C. 1873, c. 108, § 52), and is as follows:

"A. B., Governor of the Commonwealth of Virginia, to all to whom these presents shall come, greeting: Know ye, that in consideration of the sum of — dollars, paid by — into the Treasury of this Commonwealth, (or in consideration of military service performed by — to this Commonwealth, or to the United American States, as the case may be), there is granted by the said Commonwealth unto the said —, a certain tract or parcel of land, containing — acres, lying in the county of —, (describing the boundaries of the land and date of the survey), with its appur-

tenances, to the said — and his heirs forever. In witness whereof the said A. B., Governor of the said Commonwealth, has set his hand, and caused the seal of the said Commonwealth to be affixed hereunto, at —, on the — day of —, in the year —, and of the Commonwealth —.

“A. B.”

2^h. Mode of Repealing the Commonwealth's Grants, or Letters-patent.

The repeal is effected by means of a *Bill in Equity*, in the *circuit or corporation court* of the county or corporation wherein the land lies. (V. C. 1873, c. 108, § 71 & seq.; 2 Lom. Dig. 516 & seq.; 2 Insts. Com. & Stat. Law, 3, 900.)

3^h. *Caveats*.—To prevent the issuing of a Grant.

The *caveat* is entered in the *land office*, being a *caution* against any grant being issued to the party, for reasons plainly and definitely set forth in the *caveat* itself. The *caveat* is by the register certified to the *county or circuit court* of the county in which the land lies; and thereupon the clerk of the court issues a summons, requiring the applicant for the grant to appear and defend his right. The court is then to proceed to determine the right of the cause in a summary way, without pleadings in writing, impannelling a jury, if required by any party, to ascertain any material facts not agreed by the parties. If judgment be *for defendant*, upon delivery of a copy of it into the land office, the *caveat is vacated*, and the grant issues in accordance with the warrant, location and survey. If it be for the *plaintiff*, upon delivering a copy into the land office, together with a plat and certificate of survey, the grant *is issued to him*. (V. C. 1873, c. 108, § 29 to 34 & seq.; 2 Lom. Dig. 510 & seq.; 2 Insts. Com. & Stat. Law, 900.)

3^e. Fines; W. C.

1^f. Nature of Fines.

A fine is an *amicable composition* of a *collusive suit*, intended to operate as a *conveyance of lands*, by a solemn *recognition* by matter of record, of the title of the proposed vendee. It is of equal antiquity with the first rudiments of the common law. (2 Bl. Com. 348-'9; 1 Insts. Com. & Stat. Law, 3, 900, &c.)

2^f. The Proceedings in Fines.

See 2 Bl. Com. 350 &c.; Id. App'x. 449;

W. C.

1^s. The Writ of *Præcipe quod Reddat*, whereby the suit is commenced.

2^s. The *licentia concordandi*, or leave to agree the suit.

3^s. The Concord, or Agreement itself.

Where the *cognizor* (so the intended grantor who ac-

knowledges the intended grantee's title is styled), is a *married woman*, she is examined privily and apart from her husband, to ascertain whether she acted without constraint, before the court will sanction the compromise. (2 Bl. Com. App'x. 449.)

4^s. Note of Fine.

This is the *abstract of the suit*, enrolled and *proclaimed*, or published, so as to impart additional notoriety to the transaction. (2 Bl. Com. App'x. 449.)

5^s. Foot of Fine, or Conclusion.

Setting forth a connected statement of the whole transaction, followed by the *proclamations* required by a variety of statutes, from 27 Edw. I, c. 1, to 31 Eliz. c. 2. (2 Bl. Com. 352; Id. App'x. 450.)

3^d. The Several Sorts of Fines.

Fines are of *four several kinds*, of which it must suffice to say that the first is an acknowledgment of the right of the *cognizee*, as derived by previous gift from the *cognizor*; the second an acknowledgment of the right *merely*, without mentioning the previous gift of the *cognizor*; the third where the cognizor, in order to make an end of disputes, though he acknowledges no precedent right, yet grants the cognizee an estate *de novo*; and the fourth, where the cognizor recognizes the *previous right of the cognizee*, and the latter grants *back again* to the cognizor, or perhaps to a stranger, some other estate in the premises. (2 Bl. Com. 352-'3.)

4^d. The Purposes for which Fines are Employed in England.

Fines were employed in order to *bar* (*i. e.* to convey) estates-tail in fee-simple, to cut off remainders and reversions dependent thereon, to convey estates and rights of *married women*, and generally to confirm and secure suspicious titles, and put an end to all litigation. (2 Bl. Com. 353-'4, & n (14).)

5^d. The Force and Effect of a Fine; W. C.

1^s. Force and Effect of a Fine at Common Law.

The effect of a fine at common law is owing to the apparent suit and judgment therein, and in the case of a married woman, to the *privy examination also*. But independently of statute (4 Hen. VII, c. 24, but especially 32 Hen. VIII, c. 36), a fine did not bar an *estate-tail*, it having been *expressly* declared to the contrary by the Stat. 13 Edw. I, c. 1, whereby estates-tail were created. (2 Bl. Com. 354-'5.)

2^s. Force and Effect of a Fine by Sundry Statutes in England.

See 27 Edw. I, c. 1, (A. D. 1299); 5 Hen. IV, c. 14, (A. D. 1404); 1 Rich. III, c. 7, (A. D. 1483); 4 Hen.

VII, c. 24, (A. D. 1489); 32 Hen. VIII, c. 36, (A. D. 1541); 23 Eliz. c. 3, (A. D. 1581); 31 Eliz. c. 2, (A. D. 1589); 3 & 4 Wm. IV, c. 74, (A. D. 1833), *Abolishing Fines*. (3 Bl. Com. 353, & seq; Wms. Real. Prop. 46, & seq.)

4°. Common Recoveries; W. C.

1°. Origin and Nature of Common Recoveries.

Common recoveries were invented by the ecclesiastics, being one of their several very ingenious devices to evade the statutes of *mort-main*, and introduced immediately after the Stat. 7 Edw. I, St. 2, (about A. D. 1279). A common recovery is a *collusive suit*, instituted by the intended grantee against the intended grantor, in which the land in question is supposed to be *recovered by the grantee*. The ingenious inventors derived little benefit from it, the parliament having, with unwonted promptness, by Stat. 13 Edw. I, c. 32, (A. D. 1285), embraced *collusive recoveries*, within the statutes of *mort-main*. (2 Insts. Com. & Stat. Law, 520-'21); and they seem to have remained little noticed or used for almost 200 years, when, in Taltarum's Case, (12 Edw. IV, A. D. 1473), they were first employed to bar *estates-tail*, and were then awakened to fresh life and energy. (2 Bl. Com. 357, &c.; 2 Insts. Com. & Stat. Law, 86-'7, 906, &c.)

2°. Proceedings in Common Recoveries; W. C.

1°. The Writ of *Præcipe quod Reddat*.

Whereby the collusive suit is commenced. (2 Bl. Com. App'x. 450.)

2°. Appearance of Tenant, and Voucher of the pretended Vendor to Warranty.

See 2 Bl. Com. App'x. 451.

3°. Appearance of pretended Vendor, as *Vouchee*, and his undertaking to Defend the Title.

4°. Leave to Demandant to *imparl* (confer) with the *Vouchee*, and the *Vou hee's Default*.

5°. Judgment for the Land against the Tenant, or *Recoveree*, and for him over, against the *Vouchee*.

See 2 Bl. Com. App'x. 451-'2.

3°. Causes of the Efficacy of Common Recovery as a *Mode of Conveyance*.

See 2 Bl. Com. 354-'60;

W. C.

1°. The *Apparent Suit*, and *Judgment*, as if in *Invitum*.

See 2 Bl. Com. 357-'8.

2°. The Supposed *Recompense in Value*, by means of the Voucher to Warranty, which recompense is held as the Lands recovered were.

See 2 Bl. Com. 359-'60.

4^f. Force and Effect of Common Recoveries.

A common recovery, whilst it existed, was an absolute bar, not only of all estates-tail, but of remainders and reversions expectant on the determination of such estates. (2 Bl. Com. 361.)

5^f. Substitute for Common Recovery in England.

A *simple deed* executed by tenant in tail in possession, and enrolled in the court of chancery, is substituted as well for a *fine*, as for a *common recovery*, by Stat. 3 & 4 Wm. IV, c. 74, (A. D. 1833); and both fines and recoveries are abolished. (Wms. Real Prop. 46, 48.)

3^d. Conveyances by the *Special Custom* of *Particular Places*.

Conveyances which owe their validity and effect to the *special custom* (that is, the *local law*) of *particular places*, relate exclusively to *copy-hold lands*, and such customary estates as are holden in *ancient demesne*, &c. Copy-hold estates being held at the *will of the lord*, according to the *custom of the manor*, as evidenced by the copy of the rolls or record of the court of the manor, are transferred in like manner, according to the *custom of the manor*. (2 Bl. Com. 365, &c.)

In Virginia, and generally in the United States, we can have no lawful *custom*, that is in the sense of a *local law*, because a custom must be of *immemorial continuance*; but when our ancestors came hither in 1607, they brought with them the *general common law*, but *no local customs*, so that any *local custom* which is now alleged to exist here must have originated since 1607, and, therefore, cannot be *immemorial*. (Harris v. Carson, 7 Leigh, 632; Mason v. Mogus, 2 Rob. 606; Gross v. Griss, 3 Grat. 262; 2 Insts. Com. & Stat. Law, 493; 1 Do. 34.)

2^b. Incumbrances on Property.

The incumbrances on property consist of, (1), mortgages; (2), deeds of trust; and (3), judgments and other liens chiefly of record.

See 2 Bl. Com. 157, &c.; 4 Kent's Com. 135, &c.; 1 Lom. Dig. 411, &c.;
W. C.

1^c. Mortgages; W. C.1^d. Nature of Mortgages.

Mortgages are conveyances of property by *way of pledge*, and may contemplate that the property shall be retained by the creditor until out of the *rents and profits* the debt is paid. which is styled *vivum vadium*, and is now seldom resorted to; or they may transfer the property to the creditor for any given estate or interest as may be agreed upon, with a *condition to be void* if the money is paid by an appointed day. Then, if the money secured by the pledge is *paid* by the day named, the land or other subject is *dead to the creditor*; and if, on the

other hand, it is *not paid* by the day named, the land is thenceforward *in law dead to the debtor*. Seeing, then, that the land or other subject is in either event *dead* to one party or the other, the pledge is rather fancifully denominated a *mortuum vadium*, or *mortgage*.

From this description, it appears that a mortgage is a conveyance of land or other subject in fee-simple, for life or for years, as the parties may agree, with a view to *secure a debt*, &c., upon condition that the grantee's estate *shall be void*, if by an appointed day the debt is paid. If it be not paid by that day, the property is gone from the mortgagor, and becomes vested in the mortgagee indefeasibly, according to the plain and unmistakeable terms of the conveyance itself. (2 Insts. Com. & Stat. Law, 278 & seq);

W. C.

1°. Estate Conveyed in Mortgage.

The estate may be *any interest whatever* in fee-simple, for life or for years. (2 Insts. Com. & Stat. Law, 279.)

2°. The Character of the Conveyance.

The conveyance, according to the arrangement of the parties, is always expressly or impliedly *on condition* as above explained; although it may be that, by inadvertence or fraudulent design, no condition is mentioned; but the conveyance purports *to be absolute*. In such case parol (or verbal) evidence is admissible, to prove the true character of the transaction; and upon its appearing satisfactorily that a *security for money* was designed, it is construed *in equity* to be a *mortgage*. (2 Insts. Com. & Stat. Law, 281.)

3°. The Equity of Redemption.

We have seen that, in a *court of law*, if the mortgagor omits to pay the money at or before the time stipulated in the condition, the estate mortgaged becomes the *absolute property* of the mortgagee or creditor. This generally operated with more or less hardship on the mortgagor, the subject mortgaged being usually worth more than the debt; but it continued for several centuries to characterize the transaction. The court of chancery at length, upon the ground that regard should be had to the *substance*, and *not the forms of things*, and that the object of a mortgage is to secure the payment of the money stipulated to be paid, not on the *very day named*, but within a *reasonable time*, adopted the practice of obliging the mortgagee to accept the money, and discharge the mortgagee even though the day were past, so that it were offered within a *reasonable interval afterwards*. As this right was recognized only in a court of equity, it was denominated *an equity*; and as it was a *right to redeem*, it was called an *equity of redemption*, and in process of time, the equity of redemption was so inseparably annexed to the

idea of a mortgage, that not the most positive and direct stipulations would prevent it from attaching. (2 Insts. Com. & Stat. Law, 281.)

4°. Power of sale sometimes Reserved to the Mortgagee.

Within the last three-score years a pernicious practice, tending to much oppression and fraud, has sprung up in England, of avoiding the expense and delay incident to the foreclosure of a mortgage by a bill in equity, of inserting in the mortgage itself a power to the *mortgagee* to sell the mortgaged subject, should default be made in the payment of the debt. This is indeed *lupo committere agnum*. By force of such a power the creditor is allowed to sell without the intervention of a court of chancery. This practice has not received the sanction of our courts, in respect to *lands*, (although it may perhaps be admitted as to chattels); and offering as it does, such facilities for oppression and fraud, it is to be hoped it never will. In order to achieve the same result, (of a speedy sale,) we employ a *deed of trust*, whereby the subject is conveyed, not to the mortgagee, but to a *third person*, supposed to be *impartial*, and to him is committed the power of sale, and not to the creditor. (2 Insts. Com. & Stat. Law, 295 & seq.)

5°. Character of Estate of Mortgagor and Mortgagee respectively.

Upon the execution of the mortgage, the mortgagee is the *legal owner* of the land, or other subject, and is entitled to the possession thereof, unless the contrary is stipulated in the deed of mortgage itself. And although in practice the mortgagor usually remains in possession, yet, in the absence of any stipulation to that effect contained in the mortgage deed, it is only as *tenant at will*, or rather by *suffrance*, to the mortgagee. The mortgagee's title and estate are not absolute, but *conditional*, while the contingency of payment is in suspense; so that, if the mortgagor perform the condition, by paying the money at the time stipulated, the mortgagee's estate is *defeated*.

Upon the failure of the mortgagor to perform the condition, by paying the money, the mortgagee's estate, which before was conditional, becomes absolute *at law*, and then, if the mortgagor still continue in possession, it is by the assent, express or implied, of the mortgagee, and in general he is, at law, no more than the latter's tenant by *suffrance*. But the mortgagor may still assert, in a court of chancery, his *equity of redemption*, the mortgagee being in equity regarded as a mere trustee for the mortgagor, holding the property only as a security for the money due. (2 Insts. Com. & Stat. Law, 300, 315.)

2^d. Foreclosure of Mortgages.

The *right or equity of redemption* has been already described as attaching itself, *in equity*, inherently in all mortgages, that is, in *all securities for money*, no matter how expressly and peremptorily it is excluded. When, therefore, the mortgagor commits default in the payment of the money, whereby the land or mortgaged subject becomes, *at law*, the absolute property of the mortgagee, the latter may immediately file his bill in equity to *foreclose*, or cut off the mortgagor's right to redeem. Upon this *bill of foreclosure* being filed, a day is appointed to the mortgagor to redeem (usually within *six months*;) which if he fails to do, he is forever *foreclosed or barred* from asserting his *equity to redeem* thereafter, and according to the *English practice*, the ownership and possession are confirmed to the mortgagee. In the United States the land or mortgaged subject is directed *to be sold*, the debt and costs to be paid, and the residue, if any, goes to the mortgagor. (2 Insts. Com. & Stat. Law, 318 & seq.)

3^d. Forms of Mortgage most Commonly in Use.

See Grayd. Forms, 370, &c; Tate & Sand's Amer. Forms, 205, &c; First App'x to this work; Sand's Forms, 94 & seq.

2^c. Deeds of Trust to Secure Debts; W. C.

1^d. Nature of Deeds of Trust.

A deed of trust is a conveyance to some supposed impartial person *as trustee*, of lands or of chattels, *upon trust*, to let the debtor remain in possession until default is made in paying the debt, and then upon the further trust to sell the lands, &c., in the manner and upon the terms prescribed in the deed, or if the deed is silent, in the manner and upon the terms prescribed by the law, (V. C. 1873, c. 113, § 6,) and out of the proceeds, to pay, (1), The *costs and charges* attending the execution of the trust; (2), The *debt*, with the *interest* thereon; and (3), The *residue*, if any, to the debtor and his assigns. (V. C. 1873, c. 113, § 6.)

This security is now well nigh universally substituted in Virginia, and generally in the United States, for the mortgage. It has the great advantage (*to the creditor*;) of enabling him to procure the property to be sold, and subjected to pay the debt, without recourse to a court of equity, which is both expensive and attended with delay. (2 Insts. Com. & Stat. Law, 285 & seq.)

The interposition of equity is thought to be less needful in this case than in a mortgage, because the sale, and the disposition of the proceeds are made, not by the creditor, but by a *third person*, selected by the mutual choice of the parties, for his supposed *impartiality and fairness*, as alike friendly to all concerned. (2 Insts. Com. & Stat. Law, 285.)

2^d. The Trustee, his Duty and his Compensation; W. C.

1^c. The Trustee's Duty; W. C.

1^f. The General Principle of Trustee's Duty.

The trustee, in the performance of his duties, ought to be characterized especially by *fairness and impartiality*. (2 Insts. Com. & Stat. Law, 286 & seq.)

It is his *privilege* to ask at all times the *instructions* of the court of equity in the administration of his trust, that court being charged with the universal supervision and direction of all trusts, with power, for sufficient cause shown, to remove trustees, as well as to control their conduct, to appoint new trustees, and to remove all obstructions as far as may be out of the way of the efficient execution of the trust. It is the trustee's *duty* also to solicit the aid of that court, whenever any doubt is suggested *as to the sum due* and to be raised by sale under the deed, or where the title is enveloped in any doubt, which would materially depreciate the value of the property, &c. (2 Insts. Com. & Stat. Law, 312-'13.) But if the trustee, not regarding his duty, or taking another view of it, declines or omits to ask the intervention of the court, either of the parties interested, debtor or creditor, may apply for its aid. (1 Lom. Dig. 425 & seq; Wilkins v. Gordon, 11 Leigh, 527; Wash. &c., R. R. Co. v. Alex. R. R. Co., 19 Grat. 592; Rossett v. Fisher, 11 Grat. 492.)

2^f. The Particulars of the Trustee's Duty; W. C.1^s. To sell the Subject-matter, and *return an Account of Sales*.

See V. C. 1873, c. 128, § 5; Id. c. 113, § 6; 2 Insts. Com. & Stat. Law, 222, 286.

2^s. To Distribute the Proceeds according to Law.

See V. C. 1873, c. 113, § 6; Id. c. 128, § 7; 2 Insts. Com. & Stat. Law, 287.

2^o. The Trustee's Compensation.

In England *no compensation* is allowed a trustee, unless it be so stipulated in the deed creating the trust, upon the frivolous pretext that the office is one of *friendship*, and, therefore, is not to be compensated with money; but that doctrine does not prevent the trustee from employing *paid agents*, who in fact transact the whole business. The *trust-fund*, therefore, is not benefited, but rather placed at a disadvantage pecuniarily by the principle, whilst the benefit of an active personal administration by a friendly trustee, selected for his supposed capacity for usefulness, is lost. (2 Insts. Com. & Stat. Law, 223, 287.)

In Virginia a wiser system prevails, the trustee having always been allowed a fair remuneration for his trouble and risk. This remuneration the courts were accustomed to reckon at about *five per cent. on receipts*, that is, *on the debt*, or on so much of it as was made out of the trust-subject. But it might be more or less, according to

circumstances; the criterion being a *fair remuneration for trouble and responsibility*. And for misconduct on the part of the trustee, all compensation might be denied. (2 Insts. Com. & Stat. Law, 287-'8; Jones v. Lackland, 2 Grat. 87; Boyd v. Boyd, 3 Grat. 109.)

With this scheme of compensation, the legislature, not very judiciously, it would seem, have thought fit to interfere, and by statute to prescribe, *in all cases of trusts to secure debts*, one uniform rate of remuneration, being the same allowed to sheriffs, &c., in sales under execution, viz: five per cent. on the first \$300, and two per cent. on the residue of the proceeds. (V. C. 1873, c. 113, § 6.) This statutory rule being inflexible, sometimes gives the trustee less than a fair compensation, and sometimes more than is just. It places him, moreover, under a direct inducement to sell as much of the trust-subject as he can find a *plausible pretext* for selling, which is contrary to his duty (Michie v. Jeffries, 21 Grat. 324), the statute allowing commission, not *on the debt* (to which, under the administration of the courts, it was limited, (Jones v. Lackland & als, 2 Grat. 87), but *on the proceeds of sale*. (2 Insts. Com. & Stat. Law, 287-'8; V. C. 1873, c. 128, § 5, 9.)

3^d. Cases where the Aid of the Court of Chancery is Required; W. C.

1^o. Where the Title to the Trust-subject is *Clouded*.

Whether the title to the trust-subject be clouded by adverse claims or by prior incumbrances, it is alike improper for the trustee to proceed to sell, because a sale under such circumstances will generally be disadvantageous. He ought to forbear to sell until the embarrassment is removed, which must generally be done through the agency of a court of equity, either upon *his* application, or upon the application of any one interested. (2 Insts. Com & Stat. Law, 288 & seq.)

2^o. When the sum to be raised is *reasonably Doubtful*.

See 2 Insts. Com. & Stat. Law, 288.

3^o. When no Trustee authorized to act *is in Existence*; W. C.

1^t. By reason of the Death, Removal, or Refusal to act of a *Sole Trustee*.

Equity never suffers a trust to fail for want of a *trustee*, and, therefore, will supply one in any of these cases. (2 Insts. Com. & Stat. Law, 289.)

In Virginia, two statutory provisions have conveniently superseded, for the most part, the occasion at least for a *formal bill in chancery*, namely:

(1), That where a sole trustee, or all of several trustees, die, remove from the commonwealth, or decline the trust,

a new trustee may be *substituted* upon application, simply by *motion* to the circuit or corporation or county court, of the county or corporation where the deed is recorded, on ten days' notice to the creditors and other persons concerned. (V. C. 1873, c. 74, § 8.)

(2), That the *personal representative* of a *sole* or *surviving trustee* shall execute the trust, unless the instrument creating the trust shall otherwise direct, or some other trustee be appointed for the purpose by a court of chancery. (V. C. 1873, c. 174, § 9.)

2^d. By reason of the Death or Refusal to act of one of several *Joint Trustees*.

The *refusal to act* of one of several *joint trustees* has always made an application to equity indispensable, as in case of a *joint trust*, all the trustees must unite. (2 Insts. Com & Stat. Law, 289.)

The *death* of one of several *joint trustees* at common law occasioned no embarrassment, the *interest* surviving to the survivor, and the *power along with it*. And so it is by our *present statutes* in Virginia. (V. C. 1873, c. 112, § 19; 2 Insts. Com. & Stat. Law, 289-'90.)

4^o. Where the *Debtor dies* before the Trust is Executed.

It is safer to cause the trust to be executed under the immediate direction of the court of chancery, (Gibson v. Jones, 5 Leigh, 374; 2 Insts. Com. & Stat. Law, 290); but it is *not usual*, and can hardly be said to be *necessary*. (2 Insts. Com. & Stat. Law, 290; V. C. 1873, c. 113, § 6.)

4^d. The Usual Forms of Deeds of Trust.

See V. C. 1873, c. 113, § 5; Tate & Sands' Amer. Forms, 217, &c.; First Appendix to this work.

3^o. Judgments and other Liens of Record; W. C.

1^d. Judgments and Decrees.

A decree of a court of chancery, if for money or specific property, is made by statute in Virginia, (V. C. 1873, c. 182, § 1; 2 Insts. Com & Stat. Law, 270 & seq), to stand on the same footing as the judgment of a court of law, operating the same lien, and being enforced by the same procedure. (See V. C. 1873, c. 182, § 2.)

W. C.

1^o. Whence Originates the *Lien on Lands*, of Judgments and Decrees.

The lien of judgments originates in the statute 13 Edw. I, c. 18, (A. D. 1285), which authorized to be levied upon lands, a writ of execution, denominated a writ of *elegit* (2 Insts. Com. & Stat. Law, 263, & seq., 270.) That of decrees in chancery for specific property, or for money, in a statute of Virginia, putting them on the same footing as judgments. (*Supra* 1^d.) With us, however, we have a

statute specially enacting that, "Every judgment (and decree) for *money* * * * against any person, shall be a lien on all the real estate of or to which such person shall be possessed or entitled, *at or after* the date of such judgment; or if it was rendered in court, at or after the commencement of the term at which it was so rendered," with some exceptions not now needful to be noticed (V. C. 1873, c. 182, § 6); and another provision, that "the lien of a judgment (or decree) may always be enforced in a *court of equity*." (V. C. 1873, c. 182, § 9.)

It should be observed that the lien of a judgment or decree *extends to lands only*. In order to obtain a lien on *personalty*, the creditor must sue out a writ of *fiери facias*, which binds what it *may be levied* on only from the time that the writ is *delivered* to the officer *to be executed*, (V. C. 1873, c. 184, § 27 & seq); and other *personalty*, *i. e.* *personalty* on which the execution *may not be levied* (including *choses in action*, equitable interests uncertain in amount or value, &c.) from the same time, with certain exceptions, (V. C. 1873, c. 184, § 3). (But see *Puryear v. Taylor*, 12 Grat. 401; *Evans v. Greenhow*, 15 Grat. 153; *Charron v. Boswell*, 18 Grat. 222.) Our statutes, under the pressure of the disastrous consequences of the late civil war, and in pursuance of what the writer cannot but regard as the deplorable policy of obstructing the collection of debts (thus sacrificing the justice due to one class in order to protect the interest of another), have abolished the writ of *elegit* since 26th of March, 1872, (V. C. 1873, c. 183, § 26.) The *lien* of judgments and decrees, however, continues unimpaired, being preserved by the statutory declaration of the lien, (V. C. 1873, c. 182, § 6), and is enforced in a *court of equity*. (V. C. 1873, c. 182, § 9.)

2° At what time the Lien of the Judgment or Decree Commences and Terminates, and how Enforced.

The *lien commences* at the date of the judgment or decree; or if it was rendered, not in vacation, but *in court*, it commences, in general, at the *commencement of the term* at which it was rendered, (V. C. 1873, c. 182 § 6); that is, on the first day of the term, and on the *first moment* (after midnight) of that day. (1 Lom. Dig. 371-'2, and n. *; *Horsley v. Garth*, 2 Grat. 492; 2 Insts. Com. & Stat. Law, 271 &c.) The *lien terminates* only when the judgment ceases to be in force, and is no longer susceptible of being revived, where revival is necessary. And wherever the judgment is revived the lien is revived along with it. (1 Lom. Dig. 375; V. C. 1873, c. 182, § 12, 13; 2 Insts. Com. & Stat. Law, 272.)

The lien of a judgment or decree, independently of a com-

paratively recent statute (taken from 1 and 2 Vict. c. 110), extended to *all the debtor's lands* in the commonwealth. The statute referred to very judiciously declares, that no judgment shall be a lien on real estate as against a *purchaser thereof* for valuable consideration without notice, unless it be *docketed* in the clerk's office of the court of the county or corporation wherein such real estate is, either within *sixty days* next after the date of such judgment, or *fifteen days before* the conveyance of said estate to such purchaser (V. C. 1873, c. 182, § 8, 3, 4.) Although the lien of a judgment has, from an early period, been always enforceable in a court of equity, (2 Stor. Eq. § 1216, 1216 a, 1216 b; 2 Insts. Com. & Stat. Law, 294); yet it is now expressly declared by the statute that "the lien of a judgment may always be enforced in a court of equity." (V. C. 1873, c. 182, § 9.)

3°. Docketing Judgments and Decrees.

This modern requirement, so wisely made, applies, it will be observed, not against *creditors*, but only against *purchasers for value and without notice*. (V. C. 1873, c. 182, § 3, 4.)

2^d. Liens of Record, other than Judgments and Decrees; W. C.

1°. *Lis Pendens* and Attachment.

No *lis pendens*, or attachment against the estate of a *non-resident*, shall bind or affect a *purchaser* of real estate, without actual notice thereof, *unless and until* a memorandum of the title and general object of the cause, the court where pending, a description of the land, and the name of the person whose estate is intended to be affected thereby, *is left with the clerk* of the court of the county or corporation where the land is situated, to be recorded. (V. C. 1873, c. 182, § 5; 2 Insts. Com. & Stat. Law, 275-6.)

2°. Forthcoming or Delivery Bond.

A forthcoming or delivery bond returned to the clerk's office whence it issued, &c., against such of the obligors therein as may be alive when it is forfeited and so *returned*, shall have the *force of a judgment*; but no execution shall issue thereon until awarded by the court, upon motion, on ten days' notice. (V. C. 1873, c. 185, § 2; 2 Insts. Com. & Stat. Law, 274.)

3°. Vendor's Lien.

A vendor of *land*, (but *not of chattels*) is considered in equity as having a *lien on the land* for the purchase money unpaid, not only as against the vendee himself, but also against all persons claiming under him, unless they are *purchasers for value*, and *without notice*, save when the lien has been intentionally waived by consent of the parties, which it is for the vendee to show. (2 Stor. Eq. § 1217,

1224, 1226; *Beirne v. Campbell*, 4 Grat. 125; *Kyles v. Tait*, 6 Grat. 48; *Stephens v. Hutchison*, 6 Grat. 147; *McCandlish v. Keene & als.*, 13 Grat. 621.) The first case in Virginia where the vendor's lien was directly acknowledged, is *Cole v. Scott*, 2 Wash. 142. And it has since been recognized more or less emphatically in *Graves v. McCall*, 1 Call. 419; *Duval v. Bibb*, 4 H & M. 113; *Tompkins v. Mitchell*, 2 Rand, 429. But though recognized, it has not been regarded favorably by the courts, because violative of the policy which seeks to discourage *secret liens*. (*Moore v. Holcombe*, 3 Leigh, 597, 600, 601; *Bayley v. Greenleaf*, 7 Wheat. 46, 51; *Brawley v. Catron*, 8 Leigh, 522, 527; *McCandlish v. Keen & als.*, 13 Grat. 621-'2.) And at length, by statute, the lien is with us restricted to those cases where it is *expressly reserved on the face of the conveyance*. (V. C. 1873, c. 115, § 1.) Hence it is that the lien is classed with those of *record*, because the deed of conveyance is *usually recorded*, but still, as the lien may exist, although the conveyance *be not recorded*, the classification is not free from objection.

4°. Mechanics' Lien.

The lien of a mechanic for the cost of erecting or repairing buildings, or their appurtenances, on land, did not exist at common law, unless it was created in the shape of a mortgage or deed of trust; but by statute in Virginia, it is provided that where a person owning or having an interest in land, shall, by a *writing signed by him*, contract with another to pay him *money* for erecting or repairing any building on such land, there shall be a lien for such money on the whole *interest of said person* in such land, and the buildings erected thereon, from the time that the said writing is *duly admitted to record* in the county or corporation wherein the said land lies. And this lien may enure to a sub-contractor, artizan, builder, mechanic, lumber-dealer, and others performing labor or furnishing materials, &c. But the lien continues for no *more than six months* after the *last payment* becomes due (yet so as in no case to exceed *two years from the completion of the work*), unless suit be brought within that time to enforce the lien. (V. C. 1873, c. 115, § 2 & seq.)

Indeed, by a more recent statute, all artizans, builders, mechanics, lumber-dealers, and others performing labor or furnishing materials for the construction, repair, or improvement of any building or other property, shall have a lien, as hereinafter provided, upon such property, and so much land therewith as shall be necessary for the convenient use and enjoyment of the premises, for the work done and materials furnished. But where the claim is *for re-*

pairs only, no lien shall attach upon the property repaired, unless said repairs were ordered by the owner of the property, or his agent. And it should be observed, that in order to have the benefit of this lien, a general contractor must, within thirty days after the completion of the work, file in the clerk's office of the county or corporation court in which the property is situated, or if that be in the city of Richmond, in the clerk's office of the chancery court of the city, (which is there the court of registry,) a true and sworn account of the work done or materials furnished, with a statement attached, that it is intended to claim the lien, and with a brief description of the property upon which it is claimed. And from the time of such filing all persons shall be deemed to have notice thereof. (V. C. 1873, c. 115, § 3, 4.) But such lien shall not affect the property longer than six months after it is secured, unless suit be brought within that time to enforce it, or unless, in case of credit payments, when six months is allowed after the last of such payments becomes due. (Id. § 7.)

Provision is also made to allow sub-contractors, workmen, and furnishers of materials to share the benefit of the general contractor's lien, as above stated, provided due notice of their claim be given to the owner of the building, &c. (V. C. 1873. c. 115, § 5, 6, 8.)

From the terms of § 3, above cited, it might be supposed that, when the claim is not for repairs only, but for the erection of new buildings, or improvements, the lien might exist, although the work *were not ordered* by the owner of the property, or his agent. It can hardly have been the design, however, of the General Assembly thus to improve a proprietor out of his property without his consent; and that conclusion is fortified by section nine, which declares that where the person who causes the buildings or improvements to be erected, owns less than the fee-simple, *only his interest* therein shall be subject to the lien. (V. C. 1873, c. 115, § 3, 9.) But no doubt the consent or acquiescence of the owner may be as well implied from his conduct as expressed in words. Hence, if a married woman, having a separate estate in lands, allows her husband to erect buildings thereon, with her knowledge, and without an express dissent, it would seem that the lien would exist as against her. (*Spinning v. Blackburn*, 13 Ohio, (N. S.) 131; *Kidd v. Wilson*, 23 Iowa, 464; *Peck v. Hensley*, 21 Ind. 344; *Caldwell v. Asbury*, 29 Ind. 451; *Peabody v. Eastern, &c. Society*, 5 Allen (Mass.), 540.)

The lien may be enforced *by motion*, upon reasonable notice in the county or corporation court in which *the lien is recorded*, or in a court of equity, like other liens. (V. C. 1873, c. 115, § 10, 11.)

5°. Lien on Crops for Advances to Farmers.

Where advances in money or supplies are made to persons engaged, or about to engage, in the cultivation of the soil, a lien on the crops made during the year on the land for whose cultivation the advances were made, to the extent of such advances, is allowed, provided an *agreement in writing* is entered into before the advances are made, specifying the amount, which agreement is to be recorded in the clerk's office of the county in which the land lies. (V. C. 1873, c. 115, § 12.) And this lien may be enforced in a court of equity, saving to landlords their proper share of rents or right of distress, and any duly recorded liens existing at the time of making the agreement, and also such part of the crops as is by law exempt from levy or distress for rent. (Id. § 14.)

6°. Recognizances.

Recognizances operate a lien very much as judgments do, and like them must be *docketed*. (V. C. 1873, c. 182, § 3, 4, 6, &c.; Id. c. 205, § 3 to 13; Id. c. 146, § 13.)

7°. Liens for Taxes, and County Levies.

See V. C. 1873, c. 37, § 2, &c.; Id. c. 53, § 17.

CHAPTER IV.

OF WILLS.

4°. Modes of Securing and of Transferring Rights which relate to Property, *by means of Wills*.

A *Will* is an authentic and complete declaration, made in due form of law, of a man's mind or last will of what he would have to be done with his estate after his death. The word *testament* is synonymous with it, the two words being indiscriminately used in our law. (Bac. Abr. Wills, &c. (A).)

Devise (from French, *Deviser*, to speak) is a *will of lands*.

A *Legacy* or *Bequest* is a gift by will, of *personalty*.

A *Legatee* is the recipient of a Legacy or Bequest, and a *Devisee* of a Devise;

W. C.

1°. The General Principles touching Wills; W. C.

SECTION i.

1°. The Making of Wills.

See V. C. 1873, c. 118, § 2 to 6; 2 Bl. Com. 375 & seq, & n. (9); Id. 496 & seq; 2 Insts. Com. & Stat. Law, 910 & seq;

W. C.

1^d. The Making of *Wills of Lands*.

See V. C. 1873, c. 118, § 2 to 5; 2 Bl. Com. 375 & seq, & n. (9); 3 Lom. Dig. 9 & seq;

W. C.

1^o. Who may Make *Wills of Lands*.

Lands are not devisable at common law, which indeed after the Conquest, and the consequent introduction of the feudal system in England, did not admit of the alienation of the freehold at all. The necessities of society compelled a relaxation of this restriction in respect to conveyances *inter vivos* at an early period. Thus, by the statute of *quia emptores*, (18 Edw. I, c. 1, A. D. 1290), after several movements in the same direction, the free alienation of all fee-simple lands, not *held of the Crown*, was permitted without *consent of the lord*, and by Stat. 1 Edw. III, c. 12, (A. D. 1327), the *King's tenants, in capite*, were allowed a similar privilege. (2 Insts. Com. & Stat. Law, 565-'6.)

A corresponding relaxation, *in respect of wills*, did not take place until Stat. 32 Hen. VIII, c. 1, explained by 34 Hen. VIII, c. 5, (A. D. 1541-1543); a delay which is to be accounted for by the introduction of *uses* (say about A. D. 1370), whereby the people were enabled by will to dispose of, not indeed the *lands themselves*, but the *use thereof*, which practically was at least as beneficial. (2 Insts. Com. & Stat. Law, 567, 726, 178, 908-'9.)

In every country, then, which derives its jurisprudence from England, the *right to aliene* freehold estates in lands, and the *mode of alienation*, depend on *statute law*; and hence the extent of the right, and the mode of exercising it, vary more or less in each of these States, although, in respect of *wills* especially, all the statutes in this country (unless *perhaps*, those of Louisiana), have been derived from a common English original, besides copying one from another, and are, therefore, in structure, and even in terms, closely assimilated.

The Stats. 32 and 34 Hen. VIII, allowed to be devised *all* the testator's *socage*, and *two-thirds* of his *chivalry* lands; and 12 Car. II, c. 24, having, for the most part, converted the chivalry tenures into socage, all the lands in England became thereby substantially devisable. But *no form* was prescribed, save that the will should be *in writing*; and very many frauds and perjuries having thence resulted, minute directions and wholesome safe-guards were provided by the famous statute of *frauds and perjuries*, 29 Car. II, c. 3, for wills, and for some other transactions also. More recently, 29 Car. II, c. 3, has been modified in its details by 7 Wm. IV, and 1 Vict. c. 26, and by 15 &

16 Vict. c. 24 and; we have incorporated into our statute of wills substantially, as well these latter statutes as 29 Car. II, c. 3. (V. C. 1873, c. 118, § 2, 3, 4 & seq; 2 Insts. Com. & Stat. Law, 909.)

As to who may make wills of lands, our statute allows to do so any person of sound mind, over the age of twenty-one years, and not a married woman; and a married woman also, as to her *separate estate*, or in the exercise of a *power of appointment*. (V. C. 1873, c. 118, § 2, 3.)

2°. To whom Lands may be Devised.

To all persons without exception, who are *definitely ascertained*, although when the devisees are *alien-enemies*, or a *corporation* not empowered to acquire lands, they are liable to *forfeit the lands* to the Commonwealth, not being able to *hold*, although they *may take*; and in the case of one laboring *under a disability*, the *devisee may disclaim*, after the removal of the disability. (2 Insts. Com. & Stat. Law, 486 & seq; 584 & seq; 911; 3 Lom. Dig. 194; Bryan v. Hyre & als, 1 Rob. 102.)

3°. What Real Property is Devisable.

Any estate, right or interest, is devisable to which the testator may be entitled at his death, notwithstanding he may become so entitled subsequently to the execution of the will; a will being declared by statute, with reference to the *real*, as well as the *personal* estate comprised in it, to *speak and take effect*, as if it had been executed *immediately before the death of the testator*, unless a contrary intention shall appear by the will. (V. C. 1873, c. 118, § 2, 11; 2 Insts. Com. & Stat. Law, 911.)

A will of *personalty* was always understood at common law thus to speak as of the death of the testator; and it is surprising, when wills of *lands* were introduced, that the obvious analogy did not lead to a like construction *as to them*. But adhering rigorously to the *letter* of the statute of wills, which allowed any person "*having manors*," &c., or "*having a sole estate*," &c., to devise them, the English judges held that the deviser must have the estate at the time of making his will, for he cannot devise what *he has not in him* at the time of devising. (3 Lom. Dig. 29; Butler & Baker's Case, 3 Co. 30 b; Harwood v. Goodright, Cowp. 90.) The provision of the statute above cited puts wills of lands and of chattels on the same footing, and makes both speak as at *testator's death*. It will be observed, however, that the language is not to be distorted or perverted. It can only be applied to such property as it is *fairly applicable* to at the death of the testator. If the will says, "I give all my lands to A," it will embrace any

lands that the testator may own at his death, whether he owned them at the date of the will, or bought them afterwards. But if it says, "I give *Black-acre* to A," and afterwards the testator sells *Black-acre*, and buys *White-acre*, of which he dies seised, *White-acre* does not pass, because the words of the will are not applicable to it. (2 Insts. Com. & Stat. Law, 911-'12.)

4°. What *Ceremonies are Required* in the Making of Wills of Lands.

These *ceremonies* must be closely noted. They are derived in substance from the English statutes, above referred to, and especially from 29 Car. II, c. 3, § 5. A will which does not observe them in the *making*, is *void*. (V. C. 1875, c. 118, § 4 & seq.)

No will, says the statute, shall be valid unless it be *in writing*, and *signed by the testator*, or by some other person in his presence, and by his direction, in *such manner* as to make it *manifest* that the name is *intended as a signature*, and moreover, unless it be *wholly written by the testator*, the signature shall be made, or the will acknowledged by him, in the *presence of at least two competent witnesses, present at the same time*; and such witnesses shall *subscribe the will* in the *presence of the testator*; but *no form of attestation* shall be *necessary*. (V. C. 1873, c. 118, § 4; 2 Insts. Com. & Stat. Law, 913.)

W. C.

1°. The Will must be *in Writing*.

2°. The Signature.

The Stat. 29 Car. II, c. 3, § 5, did not prescribe *where* the signature should be placed, and soon after the enactment of the statute it was determined, in the great case of *Lemayne v. Stanley*, (3 Lev. 1), that it was immaterial, if the name were written by the testator himself, or by his direction, and in his presence, where it appeared, whether at the *top or bottom*, or in the *margin*. This decision (made 33 Car. II,) was often regretted, but never directly overruled until it was done by statute, both in England and in Virginia. It was agreed that the object in requiring the testator's signature was twofold, namely, (1), To *connect him* with the paper; and (2), To afford proof of the *finality* or *completion* of the testamentary intent. It was admitted, also, that the *first* object was satisfactorily attained by the testator's signature occurring *anywhere in the paper*. But it was insisted that the *second* object was wholly frustrated by allowing the signature anywhere else *but at the end*; and in response to the suggestion that the *finality of testamentary intent* was proved by the attestation of the sub-

scribing witnesses, it was said that the statute designed *two safe-guards*, the attestation of the witnesses, and the *signature also*, and that the courts thwarted the design of the Legislature when they dispensed with either. (2 Bl. Com. 376-'7, & n (9); 2 Insts. Com. & Stat. Law, 1072.) The Virginia courts, like those of England, acquiesced reluctantly in *Lemayne v. Stanley*, until November, 1818, when, in the case of *Selden v. Coalter*, 2 Va. Cas. 553, it was *very gravely doubted* whether the doctrine of that case was applicable to a will *wholly written* by the testator's own hand, which by our statute does not need to be attested by subscribing witnesses at all, for that there would then be no proof whatever of the *finality of the testamentary intent*; and afterwards, in 1845, in *Waller v. Waller*, 1 Grat. 454, that doubt as to *holograph wills* was not a little strengthened, although the court admitted that, in an *attested will*, it must follow *Lemayne v. Stanley*.

Then, in 1850, came the statute (taken from 7 Wm. IV, and 1 Vict. c. 26, and 15 & 16 Vict. c. 24,) requiring in the terms above stated, that the signature should be affixed in *such a manner* as to 'make it *manifest* that the name was *intended as a signature*. (See *Ramsey v. Ramsey*, 13 Grat. 664; *Roy v. Roy*, 16 Grat. 418; 2 Insts. Com. & Stat. Law, 913, & seq.)

3^d. The Attestation by Subscribing Witnesses.

The witnesses must be *competent*. The word employed in the Stat. 29 Car. II, c. 3, § 5, and in our statute down to 1850, was *credible*. However, it was universally agreed that *credible* meant no more and no less than *competent*, so that no progress was made in substituting the one word for the other. But there was a very serious diversity of opinion as to the period to which the statute designed to refer the witness' competency, whether to the period when he *attested the will*, as Lord Camden thought, or to the period when he was *called to prove it*, as Lord Mansfield held. This doubt the statute *does not resolve*. It seems probable that with us Lord Camden's opinion would prevail; yet *quære!* (2 Insts. Com. & Stat. Law, 915.)

There must be with us *two or more* subscribing witnesses. In other States, as in England, *three or more* are required, so that it is prudent, if the maker of a will which is intended to pass lands in another State, does not know the number of witnesses required by its laws, to have *three or more*.

The witnesses must be *present at the same time*, but they need not be *present together*, when they *subscribe*

their names. It suffices if at anytime afterwards they are present together, and with the testator, and all mutually acknowledge their signatures in the presence one of another. (*Parramore v. Taylor*, 11 Grat. 220; *Greene v. Crain*, 12 Grat. 252.)

The witnesses must *subscribe in the testator's presence.* What is the testator's presence? This will best be determined by considering the *object of the requirement*, which was to prevent a supposititious will from being fraudulently obtruded upon the testator, by having the whole transaction within the *scope of his vision*, so that he can discriminate one paper from another, and discern whether the witnesses are attesting that which he has acknowledged as his will.

Hence, attestation *in the same room* with the testator is *prima facie* in his presence, unless it appear that, from the position *actually occupied* by him, he could not see the *act of attestation*, nor *without help*, place himself in a position to see. (*Neil, &c. v. Neil*, 1 Leigh, 6.)

On the other hand, attestation *outside of the same room* in which the testator is, is *prima facie* not in his presence; unless from the position *actually occupied* by him at the moment, he could without moving his body see the *act of attestation*, if he pleased. (*Nock v. Nock's Ex'or*, 10 Grat. 106; *Moore v. Moore's Ex'or*, 8 Grat. 307; *Sturdivant v. Birckett*, 10 Grat. 67; *Shires v. Glasscock*, 2 Salk. 688; *Davy v. Smith*, 3 Salk. 395; *Casson v. Dade*, 1 Bro. c. c. 99; *Doe v. Manifold*, 1 M. & Selw. 294; *Winchilsea v. Wauchope*, 3 Russ. (3 Eng. Ch.) 441; 2 Insts. Com. & Stat. Law, 918 & seq.)

It will be remembered finally, on this point, *that no attesting witnesses* are required by our statute, if the will be *wholly written* by the testator. In that case, it is said to be *ὁλογραφή*, (*holograph*).

2^d. The Making of Wills of Chattels; W. C.

1°. Who may make Wills of Chattels.

The same persons as may make wills of lands, except that with us the *age is eighteen*, instead of twenty-one. (V. C. 1873, c. 118, § 2, 3.)

At common law, a will of chattels may be made, if in either case *discretion be actually proved*, by males at fourteen, and by females at twelve. (1 Bl. Com. 468; 2 Insts. Com. & Stat. Law, 920.)

2°. Persons to whom Chattels may be Bequeathed.

To all persons who are *sufficiently designated*. Nor is there, as in the case of lands, any disability *to hold*, even on the part of *alien-enemies*, nor of a *corporation*, in any case; save only that a bequest to an alien-enemy ought not

in general to be delivered or paid during the war. (1 Bl. Com. 372; Id. 477; 2 Insts. Com. & Stat. Law, 921.)

3°. What Chattels are *Bequeathable*.

All chattels are bequeathable to which the testator *may be entitled at his death*, except that, if he is a married man, he cannot *by will* deprive his wife of her *paraphernalia* (apparel and ornaments,) (2 Bl. Com. 436), nor of her *distributive share* of his personalty, *save with her consent*. She may renounce any provision made for her in her husband's will *within one year* from its probate, and then, or if no provision is made for her by the will, she shall have such share of his personal estate as if he had died intestate. (V. C. 1873, c. 119, § 12, 10, 13; Id. c. 118, § 11.)

4°. What Ceremonies are required for *Wills of Chattels*.

Wills of chattels, at common law, require *no writing whatever*. However large the value of the chattels, the will might be merely *verbal*, or *nuncupative*, as it is technically called. And this continued to be the law until A. D. 1678, when, by the statute of *frauds and perjuries*, (29 Car. II, c. 3,) wills of chattels were required to be, for the most part, *in writing*, although they were still not required to be *signed* by the testator.

1°. Doctrine at *Common Law*.

Wills of chattels required *no writing*, but might be in all cases *verbal* or *nuncupative*. (2 Bl. Com. 500 & seq; Wentworth's Office of Ex'ors, 11, 14; Wms. Pers. Prop. 413 & seq.)

2°. Doctrine by *Statute*; W. C.

1°. Doctrine by *Statute in England*.

The statute of *frauds and perjuries* (29 Car. II, c. 3, § 19-21, A. D. 1678,) enacted that *verbal or nuncupative wills* of chattels exceeding £30 should be valid in *only three cases*, viz. in case of,

- (1), *Mariners at sea*;
- (2), *Soldiers in actual service*;
- (3), *Persons in extremis*.

In all other cases (supposing the value to exceed £30,) they were required to be *in writing*; but *no signing* by the testator, nor *attestation* of witnesses was prescribed. But both these requirements are exacted by Stat. 7 Wm. IV, and 1 Vict. c. 26, explained by 15 & 16 Vict. c. 24. (Wms. Pers. Prop. 415-'16; 2 Bl. Com. 500, 501; 2 Insts. Com. & Stat. Law, 921.)

2°. Doctrine by *Statute in Virginia*.

In Virginia, an enactment similar to 29 Car. II, c. 3, § 19-21, existed for many years, until 1835, when the case of *Worsham's Adm'r v. Worsham's Ex'or*, 5 Leigh, 589, occasioned so much uneasiness, by presenting

sharply the danger of fraud in such a state of the law as led to the act of 1834-'5, perfected at the revisal of 1849, into its present form. The existing statute enacts that wills of chattels shall be executed with like forms and ceremonies as *wills of lands*, and allows but two out of the *three exceptions prescribed* by the English statute, namely:

- (1), Wills of mariners *at sea*; and
 - (2), Wills of soldiers *in actual service*;
- which may be still *verbal* or *nuncupative*. (V. C. 1873, c. 118, § 6; 2 Insts. Com. & Stat. Law, 922.)

SECTION II.

2°. The Revocation of Wills.

See V. C. 1873, c. 118, § 7 to 10; 2 Insts. Com. & Stat. Law, 922 & seq;
W. C.

1^d. Express Revocation of Wills; W. C.

1°. Revocation by *Subsequent Will or Codicil, duly executed as a Will*.

2°. Revocation by a *Declaration in Writing, duly executed like a Will*.

The difference between a "*declaration in writing*" and "*a will or codicil*," is that the *declaration* merely revokes the former will, and *makes no new disposition* of the property; whilst a *will or codicil*, not only revokes the old will, but *makes a new disposition*; the latter will always revoking the former, if their provisions are inconsistent, although there be no clause of express revocation in the latter, as, however, there commonly is. (V. C. 1873, c. 118, § 8.)

3°. Revocation by Testator, or some one *in his presence*, and *by his direction, cutting, tearing, burning, obliterating, canceling, or destroying* the will or codicil, or the *signature thereto*, with the *intent to revoke*.

See V. C. 1873, c. 118, § 8; Bates v. Holman's Ex'or, 3 H. & M. 502; Malone's Adm'r v. Hobbs & al, 1 Rob. 346; Hylton v. Hylton, 1 Grat. 161; Appling v. Eades, 1 Grat. 286.

It will be observed, that the acts named above are necessarily ambiguous in their nature, and so it is required that they shall be done with the *intent to revoke*. The *acts prescribed*, or one of them, and the *intent* must *both concur*. The *acts alone* are not sufficient to effect a revocation, nor is the *intent alone*. How strenuous soever may be the *testator's purpose* to revoke his will, and however plainly he may express it *by words only*, it will not avail, unless he does some one of the *designated acts*.

On the other hand, if with the *intent to revoke*, he does any of the prescribed acts, *however slightly*, the revocation is accomplished. Thus, a single *tear* or *rent*, however small, if he has completed what he designed to do, *animo revocandi*, suffices. (2 Th. Co. Lit. 640, n (4); 3 Lom. Dig. 113 & seq, 122 & seq; 2 Insts. Com. & Stat. Law, 925-'6.)

2^d. Implied Revocation of Wills.

The English Statute, 29 Car. II, c. 3, does not appear to have contemplated any other but *express revocations* of wills; but in the *construction of the statute*, the courts speedily introduced *two instances of implied revocation*, namely:

(1), From an alteration in the testator's *manner of holding the land devised*, so that, although possessed of it at his death, it was *by a different title* from that by which he held it when he *made his will*.

This was a necessary corollary from the construction which, as we have seen, the English courts placed upon their statute of wills; that is, that it did not enable one to devise what he *had not* at the *making of the will*; and the conclusion that the will was revoked by a subsequent alienation of the land devised was of course quite independent of the testator's intention. So that, if afterwards he acquired the land again, and died possessed of it, the will was not thereby revived, whatever might be his intention, unless he made a new will.

(2), From a subsequent change in the testator's domestic relations, by *marriage and the birth of a child* in the case of a *man*; and by *marriage alone* in the case of a *woman*.

The implication of revocation in this case was *presumptive merely*, at least in the case of the *man*; and if it clearly appeared that, notwithstanding the subsequent marriage and birth of issue, the testator still desired his will to stand, it was not revoked.

In Virginia, it is declared by statute, not only that a will shall be construed to speak as at the *testator's death*, but more specifically still, that no conveyance or other act subsequent to the execution of a will shall, unless it be an act by which the will is revoked, prevent its operation, with respect to such interest in the estate comprised in the will, as the testator may have power to dispose of by will *at the time of his death*. (V. C. 1873, c. 118, § 10, 11.)

The only mode of *implied revocation*, therefore, which occurs under our statute is that arising from a change of domestic relations, as by *marriage*, or by the *subsequent birth* of children of testator, *pretermitted* by the will, but *not disinherited*, for both of which cases express provision is made by the statute itself. (V. C. 1873, c. 118, § 7, 17, 18; 2 Insts. Com. & Stat. Law, 928, & seq.)

W. C.

1°. Revocation Implied from Change of Domestic Relations by *Marriage*.

"Every will," says our statute, "made by a man or woman shall be revoked *by his or her marriage*, except a will made in the exercise of a *power of appointment*, when the estate thereby appointed would not, *in default of appointment*, pass to his or her heir, personal representative, or next of kin." (V. C. 1873, c. 118, § 7.)

The policy of this provision, which is a mere modification of an implication previously adopted spontaneously by the courts, is to consult the supposed wishes of the testator in respect to the new parties, who, by the change in his domestic relations, have come to have claims upon him. Independently of the statute, the implication was only a *prima facie* presumption, capable of being repelled by evidence to the contrary, as we have seen. (*Ante* p. 78.) The statute, however, makes the presumption of an intended revocation *peremptory and conclusive*, with the sole qualification expressed in the statute itself.

That qualification, it will be observed, is in strict accord with the purpose and design of the implication, which is to afford a provision for the consort, and the children of the marriage. In the case supposed, if the appointment were revoked, it would avail nothing to the parties designed thus to be favored, since by the terms of the instrument creating the power of appointment, the property, in default of appointment, is to pass to some stranger. Thus, A, by deed or will, gives his tract of Black-acre to Z, and to such person or persons as Z, *by his last will*, shall appoint, and in *default of appointment* to P. Z, by his last will, appoints Black-acre to W, and then *marries and dies*. Now it is manifest that to revoke the appointment to W, in consequence of Z's marriage, would avail nothing to Z's wife and children, (the persons whom the policy in question seeks to benefit), because in default of appointment, the property is to go to P. In such case, therefore, *no revocation* takes place. (2 Insts. Com. & Stat. Law, 929.)

2°. Revocation of Wills, Implied from the *Subsequent Birth of Pretermitted Children*.

The statute has it in view to make provision for the contingency that, *after the will is made*, children (one or more) are born to the testator, who are *neither provided for nor mentioned*, but simply *pretermitted*; and it contemplates *two cases*, for which different arrangements are made; namely: (1), Where the testator, at the *date of the will*, had *no children*; and (2), Where, at the *date of the will*, the testator had *one or more children*; it being sup-

posed in each case that the testator has a child or children *born after the will is made*. (V. C. 1873, c. 118, § 17, 18; 2 Insts. Com. & Stat. Law, 929-'30.)

W. C.

1^f. Where, at the Date of the Will, *Testator has no Child*.

If at the date of the will the testator *has no child*, and one or more children *shall be born afterwards*, who are not provided for or mentioned, such will (except so far as it provides for the payment of the testator's debts), *shall be construed* as if the devises and bequests therein had been limited to take effect, in the event that the child shall die *under the age of twenty-one years, unmarried, and without issue*. (V. C. 1873, c. 118, § 17.)

2^f. When, at the Date of the Will, *Testator has a child living*.

If a will be made when a testator *has a child living*, and a child be *born afterwards*, such after born child, or any descendant of his, if *not provided for by any settlement*, and neither provided for nor *expressly excluded* by the will, but *only pretermitted*, shall succeed to such portion of the testator's estate as he would have been entitled to if the *testator had died intestate*; towards raising which portion the devisees and legatees shall, out of what is devised and bequeathed to them, *contribute ratably*, either *in kind or in money*, as a court of equity, in the particular case, may deem most proper. But if any such after born child, or descendant, *die under the age of twenty-one years, unmarried and without issue*, his portion of the estate, or so much thereof as may remain unexpended in his support and education, *shall revert* to the person to whom it was given by the will. (V. C. 1873, c. 118, § 18.)

SECTION iii.

3°. The Re-publication of Wills.

No will or codicil which shall have been *in any manner revoked*, shall be *revived* otherwise than by the *re-execution thereof*, or by a *codicil* executed in the same manner as an original will, and then only *to the extent* to which an intent to revive the same is shown. (V. C. 1873, c. 118, § 9; 2 Insts. Com. & Stat. Law, 930 & seq.)

The effect of re-publication is two-fold, namely: (1), To set up and re-establish a will that has been *wholly or partially revoked*; and (2), To give a will all the effect of a will *made at the time of re-publication*. (1 Lom. Ex'ors. 150; 2 Insts. Com. & Stat. Law, 932 & seq.)

It is to the first of these two effects of re-publication that the statute relates.

SECTION IV.

4°. The Probate of Wills, and their Registry; W. C.

1^d. The Necessity for Probate.

Probate of a will is the official proof, made before the proper and appointed tribunal, of the due execution of the will, ascertaining it to be the genuine and lawful expression of the last wishes of the deceased in respect to his property; whereupon it is ordered to be recorded as and for the *last will of the decedent*, and the original is deposited and preserved in the clerk's office of the *court of probate*. (2 Bl. Com. 508; Rob. Forms, 285; 2 Insts. Com. & Stat. Law, 932 & seq.);

W. C.

1°. Necessity for Probate *in respect of Wills of Chattels*.

Probate is *indispensable to the validity and effect of wills of chattels*, even at common law. (2 Bl. Com. 508; 1 Lom. Ex'ors, 197-'8; Hensloe's Case, 9 Co. 38 a; Graysbrook v. Fox, 1 Plowd. 281; Monroe v. James, 4 Munf. 194; V. C. 1873, c. 126, § 1; 2 Insts. Com. & Stat. Law, 933.)

2°. Necessity for Probate *in respect of Wills of Lands*.

Probate of wills of lands is not *indispensable*, although, as we shall presently see, *eminently expedient*. The title of the devisee is complete by the testator's death. But if the will be not admitted to probate, it has to be *proved afresh* on every occasion when its contents are relied upon in a court of justice; and on every such occasion the *original* must be produced, or its absence satisfactorily accounted for; and if the original be lost or destroyed, no legal provision is made for securing an authentic copy; but the claimant under the will must himself, at his peril, and by the exercise of his own foresight, see to it that an authentic copy shall be forthcoming, or at least that the contents shall be accurately proved.

On the other hand, if the devisee will cause the will to be admitted to probate, for which provision is wisely made by our statute (although, until recently, there was none in England), the following important advantages ensue, namely:

(1), The will can never afterwards be *collaterally* controverted; nor can it be *directly* assailed, save within the period of *five years* from the sentence of probate; allowing *one year after age* to infants, and to non-residents of the State (unless they actually appeared, or were personally summoned) *two years after sentence*. (V. C. 1873, c. 118, § 34, 35.)

(2), A copy certified by the clerk of the court where the will is admitted to probate, is *original evidence*, as satisfactory as the original will itself. (V. C. 1873, c. 172, § 5.)

(3), The original is *preserved in the clerk's office*, which is a safer depository than any private person can usually provide. (V. C. 1873, c. 118, § 37.)

2^d. Within what Time *Probate should be made*.

The will should be proved as soon as may be convenient after the testator's death; but no particular time is prescribed. Only the executor "shall not have the *powers of executor* until he qualifies as such by taking an oath, and giving bond in the court in which the will, or an authenticated copy thereof, is *admitted to record*," except that he may bury the testator and preserve the estate, which any stranger might do. (V. C. 1873, c. 126, § 1.)

Seeing, then, that the administration of the estate cannot commence until after the probate, it is more important than it was at common law, that no unnecessary delay should occur therein; for at common law the executor might, before probate, do almost all the acts incident to his office, (except some of those which *relate to suits*), subject only to have his conduct ultimately ratified and confirmed by the probate. (1 Lom. Ex'ors, 185-'6; Id. 190.)

It may seem superfluous to say that no probate can take place *during the life-time of the testator*; yet, according to Swinburne (the great authority upon the subject of wills), upon the petition of the *testator himself*, the testament may be recorded and registered amongst other wills; but it is not to be delivered forth with a probate, because it is of no force so long as the testator lives; who also may revoke or alter the same at any time before his death; an idea which seems to have been borrowed from the Roman law. (Swinb. Wills, Pt. VI, § XIII; 1 Lom. Ex'ors, 204.)

The will of a person who has been *long absent* from the country may be proved, if he be generally believed to be dead, and the executor will take upon himself to swear that he believes him to be so. (1 Lom. Ex'ors, 205; but see Swinb. Wills, Pt. VI, § XIII.) With us, if a person *who has resided in Virginia*, go from and do not return to it for *seven years successively*, he shall be presumed to be dead, unless proof be made that he was alive within that time. But any one injured by such presumption is to be restored to the rights of which he was deprived by reason of it. (V. C. 1873, c. 172, § 47, 48.)

3^d. By whom the will should be *submitted for Probate*.

It is manifestly most proper, in the case of wills of chattels always, and in the case of wills of lands, when the executor is *charged with any trust concerning* them (for merely as executor he has nothing to do with anything but terms for years in lands,) that the *executor* should propound it for pro-

bate; but it may be done by *any one interested*, as formerly even by *slaves emancipated* thereby. (1 Lom. Ex'ors, 203; Ben. Mercer v. Kelso, 4 Grat. 106; Schultz v. Schultz, 10 Grat. 358, 369.) And any person in whose custody the will is may be constrained to produce it. (V. C. 1873, c. 118, § 25.)

4^d. In what Courts the *Will may be Propounded for Probate*.

The courts of probate in England have been for several centuries, and until recently, the *ecclesiastical courts*, namely, the court of the *ordinary* (that is, the *bishop's court*), unless the decedent left *goods* above the value of £5 (called *bona notabilia*), in several dioceses, in which case the jurisdiction to admit his will to probate was exercised by the *prerogative court* of the *archbishop*. (3 Bl. Com. 95 to 98; Id. 66; Wms. Real Prop. 306 & seq.) But by statute, 20 & 21 Vict. c. 77, &c. (A. D. 1857,) the jurisdiction of the ecclesiastical courts over wills is *abolished*, and a court is established called the "*court of probate*," with a principal registry in London, and district registries throughout the kingdom, in which all wills of personal estate are now required to be proved. (Wms. Pers. Prop. 431-'2.) The same statute also makes provision for the citation before the same court of the testator's heir at law, and his devisee, when a *contest is expected* touching the validity and due execution of a *will of lands*, and for the final determination in that court of the issue *devisavit vel non*. (Wms. Real Prop. 201.)

The courts of probate in Virginia are the *circuit, county, and corporation courts*, and the local jurisdiction in each case is determined by the *criteria* following:

(1), The jurisdiction belongs to the courts (the circuit, county, or corporation court,) of the county or corporation where the decedent had a *mansion-house*, or *known place* of residence. (V. C. 1873, c. 118, § 23; Stor. Conf. Laws, § 41, 45 & seq.)

(2), If there be no mansion-house, nor known place of residence, then where *any real estate lies* that is *devised or owned by decedent*.

(3), If there be no such real estate, then wherein *decedent dies*, or wherein *he has estate*; that is, of course, *personal estate*. (V. C. 1873, c. 118, § 23.)

The locality of many chattels, particularly of *choses in action*, &c., is purely *conventional*, the things having in themselves *no locality*. Rules, however, have for ages been established in England, which assign a locality, it is believed, to *every subject* of property. See 1 Lom. Ex'ors, 201-'2; Bac. Abr. Ex'ors, &c. (E); Wentw. Off. Ex'ors, 108-'9.

Thus *movable and tangible chattels* generally are of the county or corporation where they are at decedent's death.

The *stocks of joint-stock companies* belong where the chief-office is situated, and shares are transferred.

Judgments, decrees recognizances, and other debts of record, belong where the record is kept, that is, at the seat of the court.

Bonds, mortgages, and specialties generally, belong where they happen to be at *decedent's death*; and if not then in the *State*, they are believed to belong where the *debtor resides*. (*Ex-parte*, Barker, 2 Leigh, 719; Fisher v. Bassett, 9 Leigh, 119; Wentw. Off. Ex'or, 108-'9; Bac. Abr. Ex'ors, &c. (E.) 3, (2).)

Promissory notes, bills of exchange, and all simple contract demands, belong to the county or corporation where the *debtor resides*. (Fisher v. Bassett, 9 Leigh, 119); and lastly,

Demands against the Commonwealth, belong to the county or corporation wherein is the *seat of government*. (Hudgin v. Comm'th, 2 Leigh, 248.)

5^d. In what manner the Will is *admitted to Probate*; W. C.

1^o. The modes of Proceeding in Probates.

See V. C. 1873, c. 118, § 25 to 26.

While the proceeding to admit the will to probate is *pending*, if it seems likely to continue long enough to make such expedient needful, and also, during the *infancy or absence* of the executor, the court, in its discretion, may appoint a *curator* of the decedent's estate, who shall take care that the estate is not wasted, &c., collect the debts, and pay such as the decedent owes, as far as the assets extend, and account to the personal representative when he shall qualify. (V. C. 1873, c. 118, § 24.)

This is a statutory substitute for the temporary administrations of the common law,—*durante absentia, durante minora etate, &c.*;

W. C.

1^t. Proceeding *Ex-parte*.

The proceeding *ex-parte* to admit wills to probate, takes place without summons, or even *notice* to any one; and *before the court*, without a jury. This is at common law, and was formerly with us the *exclusive mode*. (V. C. 1873, c. 118, § 34.)

Forms of entries of orders, admitting wills to probate, may be seen Rob. Forms, 285 & seq; Sand's Forms, 305, of which the examples following will suffice:

1. *Will proved by subscribing witnesses, and admitted to record.*

The last will and testament [with the codicil thereto] of A B, late of this county, deceased, was this day fully proved by the oaths of G H and K L, subscribing witnesses thereto, and was thereupon ordered to be recorded.

2. *Will without subscribing witnesses admitted to record.*

A writing purporting to be the last will and testament of A B, late of this county, deceased [together with a codicil thereto], was this day produced to the court.

And there being no subscribing witnesses to the said will [or codicil], G H and K L were sworn, and severally deposed, that they are well acquainted with the hand-writing of the said A B, deceased, and verily believe that the said will [and codicil], and the signature thereto subscribed, are wholly in the hand-writing of the said A B, deceased. Whereupon the same is ordered to be recorded as the true last will and testament [and codicil thereto] of the said A B, deceased.

2^d. Proceeding *Inter Partes*.

The proceeding *inter partes* is a *statutory* one, devised to shorten, as far as possible, the litigation touching the probate of wills. It was introduced in 1838, and is required to take place, not in the county, but in the *circuit and corporation* courts alone. All the parties are *to be summoned* and the issue of *devisavit vel non* (is it the testator's will or not), is to be submitted to the court, or if either party desire it, *to a jury*. The court may require all testamentary papers of the decedent to be produced, so that all may be passed upon at once. (V. C. 1873, c. 118, § 28 to 33, 35; Id. c. 154, § 38; Coalter v. Bryan, 1 Grat. 18.)

2^e. The Proof to be submitted to the Court, upon a question of Probate.

At common law, two forms of proof were admitted, namely: the *common form*, and the *solemn form, per testes*, or by witnesses. In the *common form*, nothing was required but the *executor's oath*, that to the best of his knowledge and belief, the paper submitted was the *last will* of the decedent. In the *solemn form* (which was employed in case the validity of the will was disputed), the proceeding was by producing the witnesses, and regularly proving the execution of the will. (2 Bl. Com. 508.)

The proof in *common form* is never used with us. We do indeed exact from the executor the precise oath he was required in that form to take; but it is not, in our practice, a means of admitting the will to probate, being administered only *after the will has been duly proved*, as part of the executor's oath of office. (V. C. 1873, c. 126, § 3.)

W. C.

1^f. Proof in Case of Original Wills, not before Proved in another Jurisdiction.

The subscribing witnesses to the will, or at all events, *one of them*, must be produced, or their absence accounted for; and if they are dead, or beyond the reach of the process of the court (*e. g.* out of the Commonwealth), their *hand-writing* is to be proved, or if that cannot be done, then the *testator's* hand-writing. And if proof of that too is wanting, the will *cannot be established*. If the subscribing witnesses, or either of them, shall be produced, it must satisfactorily appear that the will was executed

with the forms and ceremonies prescribed by the statute. If the witnesses have forgotten the transaction, but recognize their signatures as genuine, or if, in consequence of their presence being unobtainable, resort is had to the proof of their *hand-writing*, or that of the testator, it will be presumed that the execution of the will was regular and legal, unless the contrary appear. (V. C. 1873, c. 118, § 27; Bac. Abr. Wills (D) 2; 3 Lom. Dig. 43 & seq.; Dudley v. Dudley, 3 Leigh 486; Rosser v. Franklin, 6 Grat. 25; Clarke v. Dunnavant, 10 Leigh 13; Beane & ux. v. Yerby, 12 Grat. 239; Green & als. v. Crain & als., Id. 257-'8.)

When witnesses to wills reside out of the State, or although within it, are in confinement in another county or corporation, under legal process, or unable from sickness, age, or other infirmity, to attend the court before which the will is offered, the court may cause a commission to take any such witness' deposition, to be issued *annexed to the will*; and such deposition may be taken and certified as in other cases, except that no notice of the time and place of taking it need be given, unless the probate is opposed by some one who has made himself a party; and the proof so given shall have the same effect as if given in court. (V. C. 1873, c. 118, § 27.)

In respect to the *competency of witnesses* to wills, it may be observed that at *common law*, persons *incompetent to be witnesses* are—

(1), Parties to the *Record*, in the cause; *Husbands and Wives*;

See 1 Greenl. Ev. § 329 & seq.

(2), Persons *Deficient in Understanding*;

See 1 Greenl. Ev. § 365 & seq.

(3), Persons *Insensible to the Obligation of an Oath*, from *defect of Religious Belief*;

See 1 Greenl. Ev. § 368 & seq.

(4), Persons *Infamous*, by Reason of *Conviction of Crime*;

See 1 Greenl. Ev. § 372 & seq.

(5), Persons *Interested in the Result*;

See 1 Greenl. Ev. § 386 & seq.

In Virginia, important changes have been wrought in respect to these disabilities, in ordinary cases in the courts; that is, in respect to the first, the third, and the fifth. Thus: *Parties* are for the most part competent, and compellable to testify in ordinary cases; but not *husband and wife* for or against each other. (V. C. 1873, c. 172, § 21, 22 & seq.) Our *State constitution* also provides that the opinions of men in *matters of religion* shall in no wise affect, diminish, or enlarge their *civil capacities*, (Va. Const.

1869, Act V, § 14,) which is understood to do away with the disqualification arising from *defect of religious belief*, (Perry's Case, 3 Grat. 602). And lastly, it is enacted by statute, that "no witness shall be incompetent to testify, *because of interest*." (V. C. 1873, c. 172, § 21.) But in *respect of wills*, it is provided that nothing in these *statutory* enactments (V. C. 1873, c. 172, § 21,) shall be construed to alter the rules of law then in force in respect to *attesting witnesses to wills*, deeds, or other instruments. (V. C. 1873, c. 172, § 22). It follows, therefore, that all the above-described common law instances of incompetency, (with a few special exceptions presently to be mentioned), prevail with us, in respect to *attesting witnesses to wills*, *except only the third*.

The cases excepted are all cases of *interest in the will*, and one of them, also, the case of *a party*, namely, (1), The case of a *legatee or devisee*, who, or whose husband or wife, is an *attesting witness*, (V. C. 1873, c. 118, § 19.) (2), The case of a *creditor* whose debt is by the will charged on the decedent's estate, (*i. e. on his lands*), and who, or whose husband or wife, is an attesting witness, (V. C. 1873, c. 118, § 20); and (3), The case of an *executor of a will*, called as a *witness for or against it*. (V. C. 1873, c. 172, § 21; 2 Insts. Com. & Stat. Law, 1074-1076.)

In the *last case* it is enacted, that "no person shall, on account of his being an *executor of a will*, be incompetent as a witness for or against the will," (§ 21.)

In the *second case*, the statute provides that, "If a will charging *any estate* (*i. e. any real estate*), with debts be attested by a creditor, or the wife or husband of a creditor whose debt is *so charged*, such creditor shall, notwithstanding, be admitted as a witness for or against the will," (§ 20.)

In the *first case*, the provision is of necessity a little more complex. It is designed to remove the incompetency of a *legatee or devisee* under the will, who has improvidently become an attesting witness thereto, by *vacating the legacy or devise*. But where the witness, if the will were not established, would be entitled to any part of the decedent's estate, as his *heir or distributee*, this provision standing alone would give the witness an interest to *testify against the will*; for if the will be not established, he would get his due proportion of the estate, whereas, if it is established, he loses that portion, and what the will gives him also. In order to neutralize this interest adverse to the will, and as far as possible to place the witness in a position of indifference in point of interest, the statute proceeds to save to him so much of his share as

heir or distributee, in case the will is established, as will not exceed the value of the legacy or devise. The terms of the statute are as follows :

"If a will be attested by a person *to whom*, or to whose *wife or husband*, any beneficial interest in any estate is thereby *devised or bequeathed*, if the will may not be otherwise proved, such person shall be deemed a *competent witness*; but such *devise or bequest shall be void*, except that, if such witness would be entitled to *any share of the estate* of the testator in case the will were not established, so much of *his share* shall be saved to him as shall not exceed the value of what is so devised or bequeathed," (§ 19). (2 Insts. Com. & Stat. Law, 916-'17.)

- 2^d. The *Proof to be Submitted to the Court* upon a question of Probate, in case of *Wills already proved in another State or country*,—that is, being the Testator's Domicil.

Instead of the original, an authenticated copy, with the certificate of probate, may be offered for probate in any court; and when so offered, there is a *prima-facie* presumption that the will was duly executed and admitted to probate as a *will of personalty* in the State or country of the *testator's domicil*, and the copy shall be admitted to probate as a *will of personalty* in Virginia. And if it appear from such copy that the will was proved in the foreign court of probate to have been so executed as to be a *valid will of lands in this State*, by the law thereof, such copy may be admitted to probate as a *will of real estate*. (V. C. 1873, c. 118, § 26; *ex-parte* Povall, 3 Leigh 816, 819; Stor. Confl. Laws, § 465, 474.)

- 6^d. The *Effect of the Probate of Wills*.

See V. C. 1873, c. 118, § 32 to 35.

W. C.

- 1^o. Effect of Probate of Wills in Proceedings *Ex-parte*.

One not a party to the proceeding may, within *five years*, file a *bill in chancery* to *impeach or establish* the will, on which bill the chancellor must direct an issue of *devisavit vel non* to be made up and tried by a jury, to ascertain whether any, and if any, how much of what was offered for probate *ex-parte*, be the will of the decedent; saving to infants *one year after age*, and to non-residents of the Commonwealth not actually appearing, or not personally summoned, *two years after sentence*. And if no such bill be filed within the time prescribed, the sentence of the court of probate shall be forever binding. (V. C. 1873, c. 118, § 34, 35.)

This jurisdiction of the court of chancery is so independent of that of the court of probate, that a bill might formerly be filed in the *county court* in chancery, to im-

peach a will previously admitted to record in the *circuit court*, as a court of probate; (Ford v. Gardner, 1 H & M 72); and although the statute excludes from the privilege of filing a bill any one who *has been a party* to the proceeding in the court of probate, yet such a party, it is said, may still be admitted to file a bill on the ground *of a fraud*, to the existence of which he was a stranger at the time of the probate. (S. C.)

Let it be observed, that, after the lapse of the time prescribed, the probate cannot be called in question, how erroneous soever the sentence may be. (Nalle's Rep's, v. Fenwick, &c., 4 Rand. 585; Street's Heirs v. Street, 11 Leigh, 498; Schultz v. Schultz, 10 Grat. 358; Robinson v. Allen, 11 Grat. 785.)

Such a bill need only say, in general terms, that the writing admitted to probate *is not the will of the deceased*. (Malone's Adm'r v. Hobbs, 1 Rob. 346.) And when the question is decided, no farther proceedings can be had in that case. (Coalter's Ex'or v. Bryan & ux & als, 1 Grat. 18.)

Upon a bill filed to set up a will alleged to have been lost and destroyed, upon proof of the contents there should be an issue awarded, to be tried by a jury, just as when the effort is made to impeach a will admitted to probate, (Brent v. Dold, Gilmer. 211-'12); and in all cases the issue may be made up without feigned pleadings, in the very *words of the statute*; and it may be as well tried at the bar of the chancery court as in a court of law; the party sustaining the will being plaintiff, and entitled to open and conclude the cause. (Coalter's Ex'or v. Bryan & ux, 1 Grat. 18.)

It belongs to the subject of the "*Effect of Probate*," to remark that the certificate of probate granted by a court of this State, and attested by the clerk, will enable the executor to act, and may be given in evidence *in any court in Virginia*, (Dickinson v. McCraw, 4 Rand. 158), but not without the commonwealth, any more than a probate in a foreign court will of itself confer any authority here. (Burnley's Adm'r v. Duke & als, 1 Rand. 108.)

In respect to the jurisdiction of the court of probate, if it be a court where by law matters of probate are cognizable, the probate is never *void*, as was at one time thought, (Barker's Case, 2 Leigh, 719), but *voidable* only; the particular state of facts which would have authorized the court to act being a matter to be enquired into and decided by the court, whose decision, if erroneous, is *voidable* merely, and *not void*. And meanwhile, until the sentence is *reversed and annulled*, the court actually having jurisdiction

must forbear to act, and the authority conferred by the voidable probate is rightful and complete. (*Fisher v. Bassett & als*, 9 Leigh, 119; *Burnley's Rep. v. Duke & als*, 2 Rob. 129.)

2°. The Effect of Probate of Wills in Proceedings *Inter Partes*.

The sentence in this case is *final*, and no bill in equity can afterwards be filed to impeach or establish such will, unless on some ground such as would give to a court of equity jurisdiction over other judgments at law; saving to infants *one year after age*, and to non-residents who did not actually appear, or were not personally summoned, *two years after sentence*. (V. C. 1873, c. 118, § 33, 35; *Schultz v. Schultz*, 10 Grat. 365 & seq.)

7^d. Necessity for *Disclaimer of Title* by Devisee.

The will vests in the devisee even a *freehold* title, before and without *entry*, by the force and effect of the *statute of wills*, and therefore, if the devisee does not propose to accept the devise, he must *disclaim it* in such form as the *statute of conveyances* makes needful for such an estate, (V. C. 1873, c. 112, § 1,) namely, *by deed or will*. (3 Lom. Dig. 194; *Bryan v. Hyre & als*, 1 Rob. 102.)

SECTION V.

5°. How Wills may be Void, although Executed in due Form.

A will, though executed in due form, may still be void and of none effect in the several cases following, viz.:

1. When the devise is to the *testator's heir, to take as he would take as heir*.

2. When the *person* to whom, or the *object* for which the devise is made, is *not sufficiently designated or ascertained*.

3. When *fraud or force* has been used with the testator, so that his will has not been freely exercised.

4. When the devise would *result in injury to the rights* of third persons, *e. g.* creditors of testator.

5. When the devise is *too remote*.

6. When the devisee *dies before the testator*. (See 3 Lom. Dig. 176 & seq; 2 Insts. Com. & Stat. Law, 943 & seq.)

W. C.

1^d. When the Devise is to the *Testator's Heir*, to take in like manner *as he would take as Heir*.

The law does not permit a testator to devise lands *to his heir*, to take them in like manner *as he would take as heir*, in order to prevent *title by descent* from being confounded with *title by purchase*. Such confusion in feudal times would have affected the tenure of lands, and at a later period would have impaired the interests of creditors, certain of

whom could charge with their debts lands descended, but not lands devised, except in pursuance of a comparatively modern statute (3 & 4 Wm. & M. c. 14), known as the statute of "*Fraudulent Devises*."

The test by which we may determine the applicability of the doctrine to any particular case, is to *strike out the devise to the heir*, and if he would still take the same interest as the will gives him, the *devise is void*. Hence, in order that the doctrine may apply, the devisee must be the *sole heir* to the lands devised; for if he is only one of several co-heirs, although the very same share be given him as he would take by descent, he does not take it in the *same way*; for as co-heir he would take it in *co-parcenary* with his fellows. (2 Insts. Com. & Stat. Law, 433 & seq; whereas, as devisee he would take it *in severalty*, if it was devised to him alone, (2 Insts. Com. & Stat. Law, 400); and if devised to him along with others, he would take as *joint-tenant*, or *tenant in common*, (2 Insts. Com. & Stat. Law, 400 & seq; Id. 425 & seq.) In like manner, a devise to *several co-heirs* is not within the doctrine, but is good, because as devisees they will take as *joint-tenants* or *tenants in common*, whereas as heirs, they will take as *co-parceners*. (8 Lom. Dig. 178 & seq; 2 Th. Co. Lit. 646 a, n (B).)

2^d. Where the Devise is to an *uncertain Person*, or for an *uncertain Object*.

Thus a devise to "*The Roman Catholic Congregation at R*," (Gallego's Ex'or v. Atto. Genl. 3 Leigh, 450); or to "*The Baptist Association that for common meets at P*," (Baptist Association v. Hart, 4 Wheat. 372), those bodies respectively, being *unincorporated*, are void for the *uncertainty of the persons* designed to be benefited.

On the other hand, a devise for the *erection and endowment* of a seminary of learning, independently of statute. (Lit. Fund v. Dawson, 10 Leigh, 148); or "*for the benefit of the trade of the town of A*." (Wheeler v. Smith & als, 9 How. 55), are void for the *uncertainty of the objects*. (2 Insts. Com. & Stat. Law, 216-'17 & seq; Id. 584.)

In Virginia, by statute (suggested by the case of the Lit. Fund v. Dawson), it is provided that gifts and devises for *literary or educational purposes* within this State (other than for the use of a theological seminary), shall be valid, whether made to a body corporate or unincorporated, or to some natural person, with some cautious reservations. (V. C. 1873, c. 77, § 2 & seq.)

In England, very much more indulgence is manifested to *indefinite charities* than to other indefinite gifts and devises; and this diversity was long attributed, not to the common law, of which some thought the statute 43 Eliz. c. 4, merely

declaratory, but to the terms of that statute, which most supposed to have introduced a new doctrine. It was under this latter view of the law that the earlier Virginia cases (Gallego's Ex'or. v. Atto. Gen. 3 Leigh, 450; Baptist Ass'n v. Hart, &c., 4 Wheat. 372, &c.) were adjudicated. But upon an investigation of the ancient records of the court of chancery in the tower of London, about A. D. 1832, it was discovered that, in very many cases prior to the statute 43 Eliz. c. 4, a similar discrimination *in favor of charities* had prevailed in equity, and that 43 Eliz. was little more than affirmatory of the common law. Virginia, notwithstanding this development of the mistake upon which her earlier cases had proceeded, yet did not think fit to recede from the doctrine those cases had established. In Pennsylvania, however, where no previous doctrine had been recognized, the supreme court of the United States, in the great *Girard Will* case, conceived itself bound to adopt, as the doctrine of the common law, the discrimination in favor of vague and indefinite charities brought to light through the medium of the ancient records referred to above; and accordingly that court held Girard's munificent provision for the creation and endowment of a great seminary of learning, to be called by his own name, to be valid, and directed his scheme to be carried out in conformity to his will. (Vidal v. Girard's Ex'or, 2 How. 196-'7; 3 Lom. Dig. 16, 181, &c.; 189 & seq.)

It must be observed, that the question in all cases is not whether the *trustee* be ascertained, but whether the *beneficiary* or *beneficial object* be certain; for it is an established maxim of a court of equity *never to suffer a trust to fail for want of a trustee*, so that, if the trustee is not designated with sufficient certainty, supposing the person or object designed to be benefited sufficiently described, equity will *supply a trustee*. (2 Stor. Eq. § 976, 1059 & seq; Charles & als v. Hunnicutt, 5 Call. 312.)

- 3^d. Where *Fraud or Force* has been used with the Testator, so that *his Will* does not appear to have been *Freely Exercised*.

Where physical constraint is employed, of course the will is invalid. But it is in like manner void wherever it appears that the testator's *freedom of volition* has been impaired in consequence of his imbecility, his undue confidence, his over-weening affection, or otherwise. (3 Lom. Dig. 182-'3; 2 Insts. Com. & Stat. Law, 946.)

- 4^d. Where the Devise would result in *Injury to the Rights of third Persons*.

e. g. Creditors. Thus it is provided that all of a decedent's real estate shall be liable to pay his debts of all kinds;

nor can he *by his will* any otherwise affect this disposition than by directing *the order* in which the debt shall be discharged. (V. C. 1873, c. 127, § 3.)

5^d. Where the Devise is *too Remote*.

A devise is too remote when it is so limited that it is not obliged to take effect, if at all, within the period of a life or lives in being, and ten months (the period of *gestation*), and twenty-one years afterwards. Thus, a devise "to A in fee-simple, and upon the failure of his heirs at any future time, to Z in fee," is too remote as to the limitation to Z, which, therefore, is void, for it is not to take effect until the *ultimate extinction* of the line of heirs of A, which may be postponed for centuries. (2 Insts. Com. & Stat. Law, 376, 378 & seq.)

6^d. Where the Devisee *dies before the Testator*.

Where the devisee dies before the testator, the devise is liable to become void, or, according to the proper technical phrase, *to lapse* ;

W. C.

1^o. Doctrine touching *Lapse of Devises at Common Law*.

The general doctrine at common law is, that a devise lapses in all cases where the devisee dies before the testator. Where, however, the devise is to several persons *jointly*, and one of them dies in the testator's lifetime, his share does not *lapse, but survives* ; for although such joint devisees are not *joint-tenants* until the testator's death, yet the gift to them is a gift *pur mie et pur tout* (*per totum et per nihil* ; *scilicet per totum conjunctim, et per nihil separatim*), and so, if one should die, whereby, as he has nothing *separately*, his interest ceases to exist, the other or others are entitled *to the whole*, as at first, but with no one to share it with them. And as the parties have not become *joint-tenants*, the statute abolishing *survivorship* (V. C. 1873, c. 112, § 18) does not apply. (Humphrey v. Taylor, 1 Ambl. 138 ; Skipwith v. Cabell's Ex'or, 19 Grat. 788 ; Davy v. Kemp. O'Bridgm. Judgm'ts, 384 ; Wythe's Rep. (Minor's Ed.) App'x, 363, &c.)

2^o. Doctrine touching *Lapse of Devises in Virginia*.

"If a devisee or legatee die before the testator, *leaving issue who survive the testator*, such issue shall take the estate devised or bequeathed as the devisee or legatee would have done, if he had survived the testator, unless a different disposition thereof be made or required by the will." (V. C. 1873, c. 118, § 13.)

SECTION vi.

2^b. The Form of Wills.

No particular form is prescribed, but the practitioner should take great pains to make the language *precise, certain, and free from ambiguity*;

W. C.

1^o. The Common Form of Wills.

See Grayd. Forms, 551; 1 Tate & Sand's Am. Forms, 314; First Appendix to this work.

2^o. Forms of Wills of *Lands*, with sundry Limitations.

See 1 Tate & Sand's Am. Forms, 320.

3^o. Form of Will making general disposition of one's property, Securing Annuities, &c.

See Oliver's Conv'g, 562; Tate & Sand's Am. Forms, 315.

4^o. Form of Will, with various Provisions.

See Oliver's Conv'g, 586; Grayd. Forms, 558.

5^o. Form of Codicil.

See Tate & Sand's Am. Forms, 324.

6^o. Form of Nuncupative (or Verbal) Wills.

See Tate & Sand's Am. Forms, 323, 325.

THE PRACTICE OF THE LAW IN CIVIL CASES.

PART II.

ANALYTICAL VIEW OF THE MODES OF VINDICATING RIGHTS, WHETHER RELATING TO PERSON OR TO PROPERTY, WHEN THEY HAVE BEEN ACTUALLY INVADED; AND OF OBTAINING REDRESS FOR THE WRONG.

The redress of injuries is affected, (1), By the mere act of the parties; (2), By the mere act of the law; and (3), By the concurring act of the parties and of the law;

W. C.

DIVISION I.

I. Redress of Injuries effected by the *mere Act of the Parties*.

This may be in two manners, namely: (1), By the mere act of the *party injured*; and (2), By the joint act of *all the parties*;

W. C.

CHAPTER I.

1^a. Redress effected by the *mere Act of the Party Injured*.

The thoughtful student will readily realize that it cannot very often happen that redress for a wrong can be obtained by the *mere*

act of the parties, without the active concurrence of the law; and that it must be still more rare that the *sufferer* himself will be permitted to mete out justice to himself *by his own act*. Indeed, it will presently appear that it is *never* allowed, save in those cases where otherwise *no effective redress* can be had; and that any *breach of the peace* in accomplishing this self-redress is rigorously inhibited. We shall see also, in the sequel, that the fact that a party injured *may* seek and find redress by his own act, does not in anywise prevent him from appealing to those remedies provided by the law which are administered *in the courts*. To be sure, he cannot have a *double satisfaction*, but if he chooses to forbear the use of the more summary remedy, he may adopt instead the more formal proceeding *by suit in court*.

The instances of redress effected by the *mere act of the party injured* are these five, namely: (1), By *defence* of one's self, or of certain near relations; (2), By *re-capture* of goods; (3), By *entry* upon lands; (4), By *abatement of nuisances*; and (5), By *distress*. (3 Bl. Com. 3 & seq);

W. C.

SECTION I.

1^b. Defence of one's self, or of Persons standing in certain near Relations, as *Husband and Wife, Parent and Child, Master and Servant*.

It is a remarkable inaccuracy to class *self-defence* amongst the modes of obtaining *redress for a wrong*. It is manifestly calculated only to *prevent it*. It is not expedient, however, to depart from the time-honored classification, adopted not by Blackstone and by Hale only, but by all the writers who have been the most distinguished expounders of the elements of the law. And it is certainly true that one forcibly attacked in person or property, or in any of the relations mentioned, may *repel force by force*; and the breach of the peace which happens is chargeable upon him only who began the affray. The law not only considers that nature prompts the party aggrieved in such a case to resist; but also, that the future process of law is, or at least may be, by no means an adequate remedy for injuries accompanied with force, since it is impossible to say to what wanton length of rapine or cruelty outrages of this sort might be carried, unless it were permitted a man immediately to oppose violence with sufficient force to repel it. *Self-defence*, therefore, as it is justly called the primary law of nature, so it is fully sanctioned by the law of society. In our common law particularly, it is held an excuse for breaches of the peace; nay, even for homicide itself; but care must be taken that the resistance does not exceed the bounds of *mere defence and prevention*; for then the defender would himself become an aggressor. (3 Bl. Com. 3, 4.)

SECTION ii.

2^b. Re-capture of one's Goods, Wife, Child, or Servant.

Where one has deprived another unlawfully of his goods, or wrongfully detains his wife, child, or servant, the party aggrieved may lawfully claim and retain wherever he happens to find them, so it be not in a *riotous manner*, or attended with a *breach of the peace*. The reason for allowing this *self-redress* is obvious, for otherwise it might be impossible to obtain redress at all. His goods may be afterwards conveyed away or destroyed, and his wife, child, or servant concealed or carried out of his reach, if he had no speedier remedy than the ordinary process of the law. But as the public peace is a superior consideration to any one man's private property; and as, if individuals were once allowed to use private force as a remedy for private injuries, all social justice must cease, and the strong give law to the weak; for these reasons this right of re-capture is never to be exerted, where such exertion must occasion strife and bodily contention, or endanger the peace of society. If, for instance, my horse is taken away, I may lawfully seize him in a highway or public inn, provided I commit no breach of the peace in so doing; but I cannot dispossess the wrong-doer *by force*, nor break open a private stable, nor even invade a stranger's *grounds* to take him, except he be *feloniously stolen*, but must have recourse to an action at law. (3 Bl. Com. 4, 5.)

SECTION iii.

3^b. Entry upon Lands.

Entry upon lands and tenements, when another person without sufficient right has taken possession thereof, is a remedy allowed to the party himself, upon considerations analogous to those which dictate the allowance of *re-capture*; and, like that, the remedy must be exercised *peaceably and without force*. (3 Bl. Com. 5.)

It must be admitted, however, that the reason for allowing an *entry upon lands* seems to be considerably less imperative than in the case of the *re-capture* of goods, since lands are not capable of being removed beyond the reach of the party who may have been deprived of the possession of them. But although the *removal* be impossible, such were formerly the difficulties and delays in prosecuting *real actions* for the recovery of lands, that it was scarcely less important, in order to ensure redress to a person deprived of the possession of his lands, to allow him to enter thereon promptly, than to accord the privilege of re-capture in the case of chattels. But so great is the abhorrence with which the law regards the assertion of one's rights in this respect *by force*, that if one ever so clearly en-

titled to the possession shall make a *forcible entry* on lands, he is not only punishable therefor, as it would seem, (Minor's Synops. Crim. Law, 123; Dav. Crim. Law, 260; 1 Russ. Cr. 283,) but it is expressly provided that the other party, though having no rightful title to the lands, shall be restored to the occupancy thereof by the summary proceeding known as the *writ of forcible entry*. (V. C. 1873, c. 130, § 1, &c.)

And as the law allows the *re-taking* of the possession of land, it also sanctions the *due defence* of the possession thereof, and therefore, though if one enter into my ground, I must *request* him to depart before I can lay hands on him to turn him out, yet if he refuse, I may then push him out; and if he enter with actual force, I need not first request him to be gone, but may lay hands on him immediately. (Weaver v. Bush, 8 T. R. 81; Green v. Gaddard, 1 Salk. 641; Polkinhorn v. Wright, 8 Ad. & El. (55 E. C. L.) 206.)

SECTION IV.

4^b. Abatement of Nuisances.

Whatever unlawfully annoys or does damage to another is a *nuisance (nocumentum)*; and such nuisance may *be abated*; that is, taken away or removed, by the party aggrieved thereby, so as he commit *no riot*, nor *breach of the peace* in doing it. If a house or wall is erected so near to mine that it stops my *ancient lights*, which is a *private nuisance*, I may enter my neighbor's premises, and *peaceably* pull it down. Or, if a gate be erected, without leave of the court, across the public highway, (which is a *common nuisance*), any citizen passing that way may cut it down and destroy it. The law allows this private and summary method of doing one's self justice, because injuries of this kind, which obstruct or annoy one in the enjoyment of such things as are of daily convenience and use, require an *immediate remedy*, and cannot wait for the slow progress of the ordinary forms of justice. (3 Bl. Com. 5, 6, & n (6); Bac. Abr. Nuisance, (A), (B).) W. C.

1^c. Nuisances of *Commission*.

Of these the perpetrator, it is supposed, cannot but be aware, as also of their annoying others. The injured party may, therefore, abate them, *without notice* to him who commits them. (3 Bl. Com. 5, n (6); 1 Chit. Gen. Pract. 383, 648 & seq.)

2^c. Nuisances of *Omission*.

In case of a nuisance of *omission*, notice of its being a nuisance must be given to the wrong-doer, before there can be any abatement, save only in the case of branches of trees which overhang a highway, or one's private grounds, which may be cut without notice; the permitting of the branches

so to extend being an unequivocal act of negligence. (3 Bl. Com. 5, n (6); 1 Chit. Gen. Pract. 649-'50.)

3°. Extent which ought to limit the Abatement.

The abatement must be limited by its necessity, and no wanton or unnecessary injury must be committed. (3 Bl. Com. 5, n (6); 1 Chit. Gen. Pract. 650.)

SECTION V.

5^b. Distress; W. C.

1°. What is meant by *Distress*.

Distress (*districtio*) is the summary taking of a personal chattel out of the possession of the wrong-doer, into the custody of the party injured, in order to procure a satisfaction for the wrong committed. (3 Bl. Com. 5, n (8); Bac. Abr. Distress.)

2°. The cases where the Remedy by Distress is Applicable.

The remedy is, of course, restricted to cases where a summary taking of the wrong-doer's goods, without the regular process of the law, is needful, in order to afford to the sufferer the adequate redress to which he is entitled. It is limited with us to the three cases following, namely: (1), For trespasses by cattle; (2), For taxes and officer's fee-bills; and (3), For rent in arrear;

W. C.

1^d. Distress for Trespasses by Cattle.

Where a man finds the cattle of another trespassing upon his grounds, the law allows the owner of the soil to *distrain them* till *satisfaction be made* him for the injury he has thereby sustained. The animal distrained is only in the nature of a *pledge or security* to compel the performance of satisfaction; and, therefore, the distrainer can neither work nor use it, nor can it be sold, in order to raise the means of making amends. The remedy, therefore, is a very precarious and insufficient one, should the owner of the beast prove refractory. And with us, it is rendered still more unsatisfactory by the absence of any *public pound*, such as exists in England, so that resort must be had to a *special pound*, where, if it be a *pound covert* (*covered pound*), the distrainer must provide for the animal. In addition to which the common law rule still holds in this kind of distress, that if the distrainer commits any irregularity in the course of proceeding, he is a *trespasser ab initio*. (3 Bl. Com. 7, 13; 2 Tuck. Com. 5; Bac. Abr. Distress, (D) & (F).)

Upon the whole, distress for the trespasses of cattle is a remedy which it is seldom feasible to adopt, save so far as the provisions of the "*fence-law*" may warrant a very similar procedure, the animal for a third or any subsequent

trespass being liable *to be forfeited* to the party aggrieved. (V. C. 1873, c. 97, § 8.)

2^d. Distress for Taxes and Officer's Fee-bills.

Taxes are permitted to be collected by the summary proceeding of distress, because the State, county, or subordinate jurisdiction for whose use the tax is levied, requires for the public service the prompt and punctual payment of the contributions which are to defray the charges of administration. (V. C. 1873, c. 37, § 3 & seq.; Id. c. 47, § 77, 81.)

Officers' fee-bills are collectable by the same summary procedure, because the officers, being constrained to render their services when required, to any applicant, without being permitted to stipulate for pre-payment, or even in general to demand security for payment, it is considered to be but just that they should be clothed with the privilege of thus summarily coercing satisfaction of their demands; especially as they not only act under oath, but are liable to severe penalties for false charges. (V. C. 1873, c. 180, § 2 & seq.; 19 & seq., 24, 28.)

3^d. Distress for Rent.

Rent *proper* is defined to be a "right to a *certain profit* issuing *periodically*, out of lands, and *tenements corporeal*, in *retribution* (or return, *reditus*) for the *land that passes*." (2 Insts. Com. & Stat. Law, 32.)

It was originally reserved, for the most part, in *military services*, which it was of vital importance to the general safety should be rendered with the utmost promptness. The landlord, therefore, as the representative of the public interests, was clothed by the law with power to compel the tenant to perform the stipulated services by the summary process of distress; just as in modern times, for the same reason, the prompt and punctual payment of taxes is enforced by like process. As rents are now, and for several centuries have been, mere private transactions, for the faithful observance of whose stipulations the public is no more concerned than for the observance of other contracts, it is a fit topic of enquiry why the payment of rents should still be enforced by a remedy so summary as distress. It is a *technical* answer to such an enquiry, that the principles and doctrines of the common law continue until they are changed by statute, notwithstanding the reason which originally dictated them has ceased; but the true point of the enquiry is, why has not the *legislature* interposed to abolish a remedy which may seem to be no longer warranted by the altered state of society? To this question the reply is, that although the *original* reason for permitting distress for rent has long ago ceased, another reason of policy,

hardly less imperative, still operates for continuing it, namely: in order, by supplying landlords with a safe and speedy remedy for rent, to enable even the *poorest of the people to obtain homes*.

Let us observe, (1), The *sort of rent* which may be distrained for; (2), The *amount* for which the distress may be levied; (3), The application of the *statute of limitations* in respect to distress for rent; (4), The effect of the landlord's demanding *too little or too much*; (5), The *things* to be distrained; (6), *Redress for tenants* and for *third persons* respectively, where a distress is levied illegally; (7), Mode of *taking, disposing of, and avoiding* distresses; (8), The parties *to and against whom* the remedy by distress and other remedies for rent are allowed; and (9), *Other remedies* for rent besides distress;

W. C.

1°. The *Sort of Rent* which may be Distrained for.

We are to take notice of (1), The rent which may be distrained for at common law; and (2), By statute in Virginia;

W. C.

1°. The Sort of Rent which may be Distrained for *at Common Law*.

There are at common law three manner of rents, viz:

(1), *Rent-service*; (2), *Rent-charge*; and (3), *Rent-seck*.

(1), *Rent-service* is always a *rent proper*, corresponding rigorously to the definition of a rent already given. It is created always by *reservation* upon a *grant of lands*, and is a return for the land *that passes*. There is, however, another necessary element in a *rent-service*, namely, a *reversion* in the grantor. If, therefore, one grants *all his estate* reserving a rent, it is a *rent proper* but not a *rent-service*, because there is *no reversion* in the grantor. It is a *rent-charge* or a *rent-seck*, according as a right of distress is or is not reserved. (2 Insts. Com. & Stat. Law, 36-38.)

(2), *Rent-charge* is a *rent reserved* where there is *no reversion* in the grantor (in which case it is a *rent proper*), with a power to distrain for arrears *expressly granted*; or it is a *rent granted*, to issue out of the grantor's lands (in which case it is very inaccurately styled a *rent* at all, and is therefore denominated an *improper rent*) which are *expressly charged* with a right of distress should the rent be *in arrear*. It is styled a *rent-charge*, because the lands are *charged with a right of distress* by the *express stipulation* of the parties, and not, as in the case of *rent-service*, of *common right*. And it may be observed, that a *rent service* owes its name to the fact that at first such rents

comprised, for the most part, *military or other services*, including always (as the *signs of the reversion*) the services of *fealty and homage*. (2 Insts. Com. & Stat. Law, 38 & seq.)

(3), *Rent-seck* is either a *rent reserved* where there is *no reversion* in the grantor (which is a *rent proper*;) *without any power* to distrain for arrears being *expressly granted*; or it is a *rent granted*, to issue out of the grantor's lands (in which case it is an *improper rent*), which are *not expressly charged* (and therefore *not charged at all*), with a right of distress should the rent be in arrear. It is called *rent-seck* (*reditus siccus*,—a dry or barren rent), because the lands are *not charged with distress* for the arrears of it, neither *as of common right*, as in the case of *rent-service*, nor by *express stipulation*, as in the case of *rent-charge*; but the arrears can be charged on the land only by a *writ of assize*. (2 Inst Com. & Stat. Law, 40, 41.)

Having reference to these several sorts of rent, therefore, it will be observed that, at *common law*, in respect to the distraining for the arrears thereof, *rent-service* may be distrained for as of *common right*, without any stipulation to that effect, for the reason already stated; *rent-charge* may be distrained for by virtue of the *express agreement* of the parties; and *rent-seck* may not be *distrained for at all*.

There are, however, a few cases where, for special reasons, a *rent granted* may be distrained for of *common right*, without a stipulation to that effect, *e g.* in case of a rent granted *in lieu of dower*, or for *owelty* (*égalité*,—equality) of partition. (2 Insts. Com. & Stat. Law, 39, 40.)

2^d. The Sort of Rent which may be Distrained for *by statute* in Virginia.

Rent of *every kind* may with us be recovered by distress, whether it be reserved or granted, whether there is a reversion in the grantor or not, and whether there be a stipulation to that effect or not. (V. C. 1873, c. 134, § 7, 8.)

This is a remarkable perversion of principle, and a departure, it would seem, from a wise policy. A power of distress is prudently allowed to *landlords*, not for their own sakes, but in order, by ensuring to them the promptest coercion of payment of their rents, to provide, as far as possible, that even the poorest of the people shall be able to procure homes; nor is there much danger of any flagrant abuse of the power, at least by *pretending* that a party is another's landlord, where in truth no such relation exists, the *notoriety* of the fact being the best safe-

guard against fraud and perjury in that particular. But what reason of policy can be urged in favor of extending the right of distress to *rents granted*, where the parties have not stipulated for it? And not only does no reason of policy demand it, but the imminent danger of great abuses which may be perpetrated under cover of a right of distress in such cases, forbid it.

2°. The *Amount* for which a Distress for Rent may be levied.

We will note: (1), The doctrine touching *interest on arrears* of rent; and (2), The doctrine touching the *apportionment* of rent;

W. C.

1°. Doctrine touching *Interest on Arrears* of Rent; W. C.

1°. Doctrine touching *Interest on Arrears of Rent, independently of statute.*

Independently of statute *no interest* is usually allowed, in accordance with the general doctrine of the common law, which usually denies interest, except where the party *has agreed* expressly or impliedly to pay it. It may be given, however, on rent-arrear, in the discretion of the jury. (2 Tuck. Com. 6, 7; Dow v. Adams' Adm'r, 5 Munf. 23; Michie v. Lawrence, 5 Rand. 571.)

2°. Doctrine touching *Interest on Arrears of Rent, by statute.*

The statute declares that, "*in any action for rent,*" interest shall be allowed *as on other contracts.* (V. C. 1873, c. 134, § 7.)

Doubtless, distress is an *action* within the meaning of the statute; but as in other contracts, it is competent to a jury, when there is one, to deny interest under circumstances, (V. C. 1873, c. 173, § 14), so it may be done in the case of rent in arrear. As a general rule, the jury ought to allow interest, in the exercise of the discretion committed to them, (Com'th. v. Ricks, 1 Grat. 426-'7, 429-'30,) but under peculiar circumstances, it is right to deny it. (Mulliday v. Machir, 4 Grat. 4, 9.)

2°. The Doctrine touching the *Apportionment of Rent.*

Let us observe, (1), The different sorts of apportionment; (2), The principles regulating the apportionment of rent; and (3), The mode of making apportionment of rent.

W. C.

1°. The different *sorts of Apportionment.*

The word *apportionment* is unfortunately used in this connection in a two-fold sense. It means sometimes an *abatement of the amount* of the rent, and sometimes it signifies a *division of the rent* amongst several, without any abatement to him who has to pay it. Thus, if part

of the premises granted, for which the rent is reserved, be lost by title paramount, the rent is to be *apportioned* in the sense of being *abated in amount*, in proportion to the land lost. And if, on the other hand, the landlord sells half the reversion to a stranger, the rent is also *apportioned*, but this time in the other sense of being *divided* between the landlord and the assignee of one half the reversion. (2 Insts Com. & Stat. Law, 48.)

Provision is made in Virginia, by statute, for apportionment of both kinds, under appropriate circumstances. Thus, an instance of apportionment in the sense of *abatement of amount*, occurs in the statute (V. C. 1873, c. 136, § 4,) which enacts (contrary to the common law) that where the holder of a rent granted shall purchase part of the land out of which the same issues, the rent shall be *apportioned* in like manner as if the land had come to him "*by descent*;" and so, where the holder of the land purchases part of the rent issuing out of it, the rent shall also be *apportioned*. On the other hand, we find an instance of the other kind of apportionment, consisting in a *division* of the rent, in the statute, (V. C. 1873, c. 136, § 1,) which enacts that, on "the determination, by death or otherwise, of the estate or other thing from or in respect of which any rent, hire, or money, coming due at *fixed periods*, issues or is derived, or on the death of any person interested in such rent, hire, or money, the person, or the personal representative or assignee of the person who would have been entitled, but for such death or determination, to the rent, hire, or money coming due at any such period, shall have a *proportion* thereof, according to the time which shall have elapsed of the time for which the said rent, hire, or other money was growing due, including the day of such death or determination, deducting a proportional part of the charges."

2^d. The Principles which regulate the Apportionment of Rent; W. C.

This subject will best be discussed in connection with the several sorts of rents, as *reserved* or proper, and *granted* or improper. Let us advert, therefore, to the principles which regulate the apportionment of (1), Rent *reserved*, and (2), Rent *granted*;
W. C.

1^h. The Principles which regulate the Apportionment of Rent *Reserved*.

If in the case of *rent reserved* the landlord divides his reversion, the rent undergoes a corresponding *division*, or apportionment. And if the tenant divides the

tenancy with the landlord's consent, the rent is again *divided* or apportioned, not as before, in respect to the allotments *to be received*, but in respect to those *to be paid*.

If, furthermore, the tenant loses part of the land by *title paramount to the landlord's*, or by the landlord with his consent *taking it back*, or by *destruction of the land* by earthquake, &c., the rent (being a compensation for the land) is *abated* in the same proportion.

2^b. The Principles which regulate the Apportionment of *Rent Granted*; W. C.

The principles are such as prevail, (1), At common law; and (2), By statute;
W. C.

1^a. The Principles prevailing at *common law*.

At common law, *rent granted* was not favored, because it tended to diminish the capacity of military tenants to render the services stipulated. The law held, therefore, that if the contract was by the *act of the parties* (in contra-distinction to the *act of the law* or of *God*.) so modified that it was not just to carry it out fully, the law would not itself make a corresponding apportionment, and so the rent *became extinct*. Now, when in case of rent granted, the grantee of the rent acquired *by purchase*, that is by his own act, *a part of the land out of which the rent issued*, it would be unjust that the grantor should continue to pay the *entire rent*, (the grantee being in possession of part of the land out of which it issued), but the law declined of itself to *make a corresponding apportionment*, and so the rent *became extinct*. (2 Insts. Com. & Stat. Law, 48, &c.) In this case then, there was no *apportionment of a rent granted*.

But if the grantee of the rent acquired a part of the land by the *act of the law*, or the *act of God*, an *apportionment of the rent was made*, as justice required. (2 Insts. Com. & Stat. Law, 48.)

In some cases, however, rent granted is *apportioned* in the sense of *divided*. Thus, if a rent of \$1,000 a year is granted to A and he dies leaving two children, the rent is apportioned or *divided* between them. So if A sells his rent to several parties, or a portion of it to a third person, whilst he keeps the remainder, an apportionment or *division* takes place. (2 Insts. Com. & Stat. Law, 48.)

Finally, in case of *rent granted*, if the grantor loses, by the assertion of some better title, a part of the land out of which the rent issues, *no apportionment*.

takes place, the rent not being a compensation for the land. (2 Insts. Com. & Stat. Law, 52.)

2^d. The Principles prevailing *by Statute in Virginia*.

The statute provides (V. C. 1873, c. 136, § 4) that where the holder of a rent shall *purchase* part of the land out of which the same issues, the rent shall be apportioned in like manner as if the land had come to him *by descent*, and so *vice versa*, where the holder of the land shall purchase part of the rent, &c.

3^d. The Mode of Making Apportionment of Rent.

The same remedy lies for *any part* of the rent as for the whole, and the apportionment is to be adjusted by a jury. (V. C. 1873, c. 136, § 2.)

3^o. The Application of the *Statute of Limitations* in respect to Distress for Rent; W. C.

1st. The Ultimate Period allowed for Distress.

Five years are allowed from the time the rent became due, whether the *lease be ended or not*. (V. C. 1873, c. 134, § 10.)

2nd. Period allowed for Distress *after Removal* from the leased Premises of the chattels liable to Distress.

The distress may be levied on any goods of the *lessee, or his assignee, or under tenant*, found on the premises, or which may have been *removed therefrom not more than thirty days*. (V. C. 1873, c. 134, § 11.)

4^o. The effect of the Landlord's Demanding *too little or too much Rent*.

If the landlord distrains *for too little* rent, he is barred *as to the residue*, not being permitted to harass the tenant with a multiplicity of distresses. And if he distrains for more than is due, his demand may be not only reduced to the proper amount in the proceeding itself, but the tenant may maintain an action against him for his oppressive conduct. (3 Bl. Com. 12; 2 Tuck Com. 8; Bac. Abr. Distress (E).)

5^o. Things which are *liable to be Distrained for Rent*.

All chattels *upon the leased premises* are at common law liable to be distrained for rent, with certain exceptions, (3 Bl. Com. 7, &c.; Bac. Abr. Distress (B) 1,) classified under three heads, namely: (1), Of certain things from *their nature*; (2), Of certain things from *public policy*; and (3), Of certain things from considerations of *reason and justice*.

1st. Exception of Certain Things *from their Nature*.

The things which *from their nature* may not be distrained are, (1), Things wherein *no absolute property* can exist; (2), Things of a nature to be injured by keeping; and (3), Things *fixed to the freehold permanently*; W. C.

1st. Things wherein *no absolute property* can exist.

e. g. : Animals *feræ naturæ*, that is, of a wild nature. (Bac. Abr. Distress (B), 1.)

2nd. Things of a Nature to be *injured by Keeping*.

e. g. : Milk, hay, or straw in ricks, &c. (Bac. Abr. Distress (B), 1.)

The *principle* of this exception at common law is, that things distrained cannot be sold, but must simply be kept by the distrainer until the rent is paid. It, therefore, extended to everything which could not be returned in the *same plight* in which it was taken. In Virginia, and in England, by statute, things distrained have for ages been permitted *to be sold*, so that the exception now includes those things only which cannot be kept uninjured during the *ten days* which is required to give notice of the sale. Milk, therefore, is undistrainable. It is believed that hay and straw may be distrained; for although a statute which once existed, and expressly allowed it, has now been repealed, the case is probably provided for by an enactment allowing a distress to be levied *on any goods* belonging to the lessee, his assignee, or under tenant, found on the premises, or not removed therefrom more than thirty days. (V. C. 1873, c. 134, § 11.)

3rd. Things Fixed to the Freehold.

e. g. : Mill-stones, growing crops, &c. (Bac. Abr. Distress (B), 1.)

In Virginia, by statute, Indian corn, though not severed, may be distrained *after 15th October* of any year. (V. C. 1873, c. 49, § 32.)

2^d. Exception of Certain Things from *Public Policy*.

The things excepted from distress from *public policy*, embrace, (1), Things in the *personal possession* of the party; (2), Things of value *not the property of the tenant*; (3), The tools of a *man's trade*; and (4), Certain goods of domestic utility in favor of a *husband or parent*, or other person who is a *house-keeper or head of a family*; W. C.

1st. Things in the *Personal Possession of the Party*.

Things in the *personal possession and use* of the tenant cannot be distrained, because it would endanger a *breach of the peace*; distress being, at common law, a *private* and not a *judicial process*. (3 Bl. Com. 8; Bac. Abr. Distress, (B), 1.)

And although with us, as we shall presently see, the process is *judicial*, yet the legal doctrine previously existing is supposed not to be thereby changed.

2nd. Things of Value *not the Property of the Tenant*; W. C.

1^h. The Doctrine at *Common Law*.

At common law, *everything on the leased premises*, whether belonging to the tenant or not, (in order to avoid fraud and collusion,) was in general liable to distress. The only exceptions to this general doctrine were such as were dictated, (1), By the *interests of trade*, *e. g.*, a horse at a rented blacksmith's shop *to be shod*, cloth at a leased tailor's shop *to be made up*, &c. (3 Bl. Com. 8; Bac. Abr. Distress, (B), 1); or (2), By the fact that the goods are on the premises *casually*, for a *very short time*, and *without default* on the part of the owner, *e. g.*, where cattle are trespassing on the leased premises without the owner's knowledge, and are not *levant* and *couchant*, that is, have not stayed *there all night*, so as to *lie down and rise up*, for in that event the owner is not without default. In these two excepted cases the goods are not liable to be distrained. (3 Bl. Com. 8, 9; Bac. Abr. Distress, (B), 1.)

2^h. The Doctrine by statute in Virginia.

Things with us are in no case liable to be distrained, even though they may be upon the leased premises, unless they belong to *the lessee, his assignee, or under-tenant*. And if the goods are subject to a valid lien when they are carried upon the premises, only the interest of the lessee, assignee, or under-tenant therein can be subjected. On the other hand, if the lien were created after the goods came on the premises, they are liable (as in the case of execution) for the rent due and to become due, *not exceeding one year's rent*. (V. C. 1873, c. 134, § 11, 12; Davis v. Payne's Adm'r, 4 Rand. 332; Harvie v. Wickham, 6 Leigh, 243; Jones et als v. Phelan & al, 20 Grat. 238.)

3^d. The Tools of a Man's Trade.

The tools of a man's trade (*e. g.*, the axe of the carpenter, the books of a scholar, and a *fortiori*, of a lawyer, &c.), are exempt from distress at common law, because the distress is taken merely *as a pledge* to constrain the tenant to pay the rent; and to deprive him of the implements of his calling would make it impossible that he should do so. (Bac. Abr. Distress, (B), 1.) The statute with us, as in England, makes the things distrained *saleable*, as if they had been *taken in execution*; but that probably works no change in the principle; and that conclusion is partly confirmed by the statutory provision which exempts from *distress*, in case of a *mechanic*, the tools and utensils of his trade, *not exceeding \$100 in value*, and *one sewing machine*, whereby the Legislature seems to design to limit in those cases an exemption which else would be unlimited. (V. C. 1873, c. 49, § 33, 34; Id. § 35 & seq.)

- 4^g. Certain goods of domestic utility, in favor of a *Husband or Parent*, or other person who is a *House-keeper or Head of a Family*.

The exceptions under this head are very numerous, so that in the case of *poor persons*, where the right of distress is most essential to enable the party to obtain a home without paying the rent in advance, or giving collateral security, (neither of which poor persons are commonly prepared to do,) the right of distraining is *practically done away with*. And this is what the officious demagogue persuades the poor voter in his ill-conditioned cabin, is *par-excellence, a poor man's law!* (V. C. 1873, c. 49, § 33, 34.)

- 3^f. Exceptions of certain things from *Considerations of Reason and Justice*.

Some chattels are exempt from distress from considerations of *reason and justice, e. g.* goods in the *custody of the law*, as those taken in execution, but left by the indulgence of the officer, or in pursuance of the execution of a *delivery bond*, (V. C. 1873, c. 185, § 1), in possession of the tenant, but only until the day appointed for the sale is elapsed.

- 6^e. Redress for Tenants, or for third Persons, where *Distress is levied illegally*.

The modes of redress when a distress is illegally levied, may be divided into (1), The modes at common law; and (2), The modes by statute in Virginia;
W. C.

- 1^f. Modes of Redress at *Common Law*; W. C.

The modes of redress at common law, for an illegal distress are, (1), By writ of replevin; (2), By writ of injunction; and (3), By action of trespass, or of trespass on the case.

W. C.

- 1^g. Remedy by Writ of Replevin.

The writ of replevin is at common law applicable both to the tenant and to a stranger, wherever either has occasion to complain of an illegal distress. Replevin is, indeed, adapted to procure redress for *any unlawful taking* whatever, and is by no means limited, as Blackstone states, to an unlawful taking by *way of distress*. (3 Bl. Com. 145; 1 Chit. Pl. 185, 188; Vaiden v. Bell, 3 Rand. 448.)

To *replevy* (*replegiare*, to re-deliver to the owner, upon pledges, Jac. Law. Dict. Replevin), is where a person whose goods are unlawfully taken applies for a *writ of replevin*, and has the goods *returned into his own possession*, upon giving good security to try the right of

taking them in a suit at law, and if that be determined against him, to restore the goods to him from whom by virtue of the writ they are taken; or according to our practice in Virginia, whilst we retained the writ of replevin, upon condition to *perform and satisfy the judgment of the court*, which, where the taking was by way of distress, and the judgment for the landlord, was, not that the goods taken be *restored*, but for the *rent due*. (3 Bl. Com. 13, 140; Rob. Forms, 384, 119.)

2^a. Writ of Injunction.

This remedy, which is administered in the *courts of chancery*, is also adapted to either *tenant* or *stranger*. It *forbids* or *enjoins* the landlord from proceeding further with his distress, upon the ground that it is *illegal*, and that the law affords *no adequate remedy* for him whose goods have been seized, usually because the goods have a *peculiar value*, (*pretium affectionis*) which their *market value* (or indeed any monied price), would not represent nor properly compensate. The court of chancery will not award the writ of injunction (with us it is only *an order*, *no writ* actually issuing in practice,) until the applicant has given bond, with good security, conditioned to pay all damages and costs in case the injunction should be dissolved.

This interposition of the court of equity illustrates the fundamental principle which regulates its jurisdiction in modern times, namely: that where *there is a right*, equity will always *afford a remedy*, if there is *no adequate remedy at law*, so that irreparable damage would ensue if its aid were denied. (Buxton v. Lister & al, 3 Atk. 383, 385; Flint v. Brandon, 8 Ves. 163; Bowyer v. Creigh, 3 Rand. 32; Poage v. Bell, Id. 583.)

3^a. Action of Trespass, or of Trespass on the Case.

The action of trespass, or of trespass on the case, may be, either of them, supported where a distress has been made for rent, when no rent is due, or after a tender of the rent. (1 Chit. Pl. 158.) Whilst trespass lies for any irregularity which renders the distrainor a trespasser *ab initio*, and trespass on the case for irregularities which do not render him such a trespasser, and for an excessive levy, or a wrongful seizure of property not liable to be distrained. (1 Chit. Pl. 158, 176, 178, 197.)

2^d. Modes of Redress by Statute in Virginia, for Tenant or for Stranger, where Distress is Levied illegally.

The legislature of Virginia having, in 1823, accommodated the law to Blackstone's fallacious representation, that replevin lay only in case of *illegal taking by way of distress*, thereby circumscribing the practical application

of one of the most useful and beneficent remedies in the law, they proceeded further, at the revisal of 1849, to *abolish it altogether*, enacting (V. C. 1873, c. 145, § 4), that "no action of replevin shall be brought" after 1st July, 1850. But there being an obvious necessity to provide some substitute therefor, a two-fold proceeding was devised, namely, (1), By the process of *interpleader*, where *strangers* complain of the distress; and (2), By a *Delivery or Forthcoming bond*, where the complaint is made by *Tenants*. Besides these, there are the actions of trespass and of trespass on the case, as at common law, and the writ of injunction;

W. C.

1^s. Remedy by Process of *Interpleader*.

The name, and somewhat of the idea, of the process of *interpleader* was borrowed from the *courts of equity*, but with some material modifications in *principle*, as well as in *detail*. (Mitf. Eq. Pl. 52, 47, 125; Stor. Eq. Pl. § 18, 291 & seq.; V. C. 1873, c. 149, § 1.)

1^h. Origin of the Process of *Statutory Interpleader*.

This has been just explained. It was intended as a substitute in part, for the far more useful action of *replevin*, which the statute unfortunately abolished. (V. C. 1873, c. 149, § 1, 2, & seq.)

2^h. The *Parties* in whose favor the Process of *Interpleader* is allowed by Statute.

The statute allows the process of interpleader never in case of the tenant, but only in the case of *third persons*, namely, (1), Of the *Claimant* of the Property distrained, provided he shall execute a *suspending bond*, with good security, conditioned to pay all damages sustained by any one in *consequence of the suspension*, (V. C. 1873, c. 149, § 2, 6); (2), Of the *Officer* who has the Warrant of Distress in hand, provided no *indemnifying bond has been given*, (V. C. 1873, c. 149, § 2); and (3), Of the *Landlord* or person who issued the Warrant of Distress, (V. C. 1873, c. 149, § 3.)

3^h. The *Proceedings* in the Process of Interpleader.

The process of interpleader is by the statute made available only when the taking is by *judicial process*, that is, under a *warrant of distress* or an *execution*. (V. C. 1873, c. 149, § 2.)

The process may be awarded by the circuit court, or the court of the county or corporation in which the property is taken, or by the judge of such *circuit court*, in vacation, (V. C. 1873, c. 149, § 2); or if the value of the property is not greater than twenty dollars, the

process may be awarded by a *justice of the peace*. (V. C. 1873, c. 147, § 14; First Appendix to this work.)

If the process of interpleader is awarded at the instance of the *officer*, it requires to appear before the court, as well the *distrainor* as the *claimant*; if awarded at the instance of the *distrainor*, it requires the *claimant* to appear before the court; and if awarded at the instance of the *claimant*, it summons the *distrainor* to appear. (V. C. 1873, c. 149, § 2, 3.)

The parties being thus convened before the court, it is empowered to exercise for the decision of their rights all of the powers and authority prescribed for the chancery courts in *equitable interpleaders*; *questions of fact* which arise being decided either by the court or by a jury, as the parties may elect. (V. C. 1873, c. 149, § 1, 2.) The proceeding before a justice of the peace is, of course, still more summary. (V. C. 1873, c. 147, § 14.)

The *claimant* of the property may *suspend* the sale of the goods by executing a *suspending bond*, as above described, conditioned to pay all damages arising from the suspension, (V. C. 1873, c. 149, § 6; First Appendix to this work); and may have the goods restored to the possession whence they were taken, by executing a *forthcoming or delivery bond* (if the case be one in which such a bond is not prohibited by V. C. 1873, c. 185, § 6), conditioned that the property shall be forthcoming at such a day and place of sale as may be thereafter lawfully appointed; the property meanwhile remaining at the *risk of the claimant*. (V. C. 1873, c. 149, § 7; First Appendix to this work.)

2^d. Delivery or Forthcoming Bond.

This is the mode provided by statute, in place of the action of *replevin*, whereby a *tenant* may obtain redress for an illegal distraining of his goods. (V. C. 1873, c. 185, § 1 to 4; First Appendix to this work.)

The tenant who proposes to make such a complaint, when the warrant of distress is levied on his goods, executes a *forthcoming or delivery bond*, conditioned that the property shall be forthcoming at the day and place of sale, designing to forfeit the obligation by not delivering the goods according to the condition. He does so accordingly, and when the distrainor proceeds on motion, on the usual notice, to ask for an *award of execution* on the bond (which already has the *force of a judgment*, V. C. 1873, c. 185, § 2), the statute allows the tenant to "*make defence*," on the ground that the distress was for rent not due, in whole or in part, or was other-

wise illegal. (V. C. 1873, c. 185, § 4; Allen & als v. Hart, 18 Grat. 726 & seq.)

3^d. Remedy by Writ of Injunction.

The same considerations are applicable here as *supra*, p. 109, 2^d; and especially, that in order to warrant the interposition of the court of equity, it must clearly appear, either that the party has *no remedy at law*, or an *inadequate one*.

4th. Remedy by Action of Trespass and Trespass on the Case.

These remedies are applicable as at common law. (*Ante*, p. 109; V. C. 1873, c. 49, § 35; Id. c. 134, § 14.)

7^o. Mode of *Taking, Disposing of, and Avoiding Distresses, &c.*; W. C.

1st. Mode of *Taking Distresses*.

Let us take notice, (1), Upon what warrant a distress is taken; (2), At what place; (3), At what time; (4), What degree of force may be used in making distress; (5), The consequences of irregularity or illegality therein; and (6), The proceedings to be had when rent is reserved in anything other than money;

W. C.

1st. Upon *what warrant* a Distress is taken.

At common law, a landlord distrains his tenant's effects, either with his own hands, or by means of his private bailiff, who acts in pursuance of a *warrant from his employer*, there being *no judicial authority* required in any case. (3 Bl. Com. 11; First Appendix to this work.)

In Virginia, by statute, the distress must be made in pursuance of a warrant issued by a *justice of the peace*, upon an *affidavit* of the person claiming the rent, or his agent, that the amount of money or other thing to be distrained for (to be specified in the *affidavit*), as he verily believes is justly due to the claimant for rent *reserved upon contract* from the person of whom it is claimed. The warrant is furthermore not executed by a *private person*, but by a constable, sheriff, or other officer of the county or corporation wherein the premises are. (V. C. 1873, c. 134, § 10.)

2^d. At what *Place* Distress must be taken.

The distress must, at common law, be taken on *the leased premises*, and not elsewhere; but by statute taken from 8 Anne, c. 14, and 11 Geo. II, c. 19, it may be levied on any goods of the lessee, or his assignee or under-tenant, found on the premises, or which may have been removed therefrom *not more than thirty days*. (V. C. 1873, c. 134, § 11; 3 Bl. Com. 11.)

3^d. At what *Time* Distress must be taken.

The distress cannot lawfully be made until the *rent is due*; and it should be remembered that it is not due until *after midnight* of the day on which it is payable. Nor can the distress at *common law* be levied except *by daylight*, it not being deemed safe to allow a mere *private process* of redress to be carried on *at night*, under cover of which grievous wrongs and oppressions might be perpetrated. By statute, however, the *officer* (who acts under sanction of his oath and official responsibility, may, *by day or night*, break open and enter into any house or close wherein there may be any goods liable to distress, which may have been *fraudulently or clandestinely* removed from the demised premises. (V. C. 1873, c. 134, § 13; 2 Bl. Com. 11.)

4^d. What *Degree of Force* may be used in making Distress; W. C.

1^h. Doctrine at *Common Law*.

The distrainer must not break open an *outer door* of the *dwelling of the tenant*; but he may break open an *inner door*, or the outer door of an out-house, or the outer door of any *stranger's dwelling*, provided goods liable to distress *are found therein*. (3 Bl. Com. 11.)

2^h. Doctrine *by statute*, in Virginia.

In levying a *distress-warrant*, even the *outer door* of the *debtor's own dwelling* may be broken open, if there be *need for it*. (V. C. 1873, c. 134, § 13.) But in levying *executions* the common law remains unchanged. The statute applies only to *distress-warrants*.

5^d. Consequence of *Irregularity or Illegality* in making distress, when *some Rent is Due*; W. C.

1^h. Doctrine at *Common Law*.

At common law any irregularity or illegality makes the distrainer a trespasser *ab initio*. This is a principle applicable to all cases of *summary* and irregular procedure. In order to guard against the abuse of such modes of procedure, the party resorting to them is bound to pursue them with rigorous accuracy, under the penalty of being deemed a wrong-doer from the beginning, and of being answerable for damages, not merely *for the excess* over and above what the law authorized him to do, but *for all that he did*, the whole being considered as without excuse. (3 Bl. Com. 15.)

2^h. Doctrine *by Statute* in Virginia.

By statute with us, any irregularity or illegality in distress *for rent justly due*, subjects the distrainer to an action for damages; but the distress itself is not to be deemed to be unlawful, nor the party making it to be

therefore deemed a trespasser *ab initio*. (V. C. 1873, c. 134, § 14.) But when *no rent is due* the common law doctrine is unchanged, and the distrainer is a trespasser *ab initio*.

6^e. Proceedings when Rent is Reserved in *anything other than Money*.

When the rent is reserved *in a share of the crop*, or in anything other than money, the claimant makes affidavit, as in other cases, that the thing to be distrained for, (to be specified in the affidavit,) as he verily believes, is of the value of — dollars, and is justly due to the claimant for rent, *reserved upon contract*, from the person of whom it is claimed. The warrant issued by the justice then directs the officer to *return the warrant*, with a report of what he has done with it, to the next county or corporation court, and upon *ten days' notice*, or if the tenant be out of the county, having set up the notice in some conspicuous place on the premises, the claimant may obtain from the court an order ascertaining the *value of the rent* in money, (which valuation, if either party require it, may be made by a jury,) and directing the goods distrained to be sold to pay the amount so ascertained. (V. C. 1873, c. 134, § 15; *Brooks v. Wilcox*, 11 Grat. 411; First Appendix to this work.

2^f. Mode of *Disposing of Distress* when taken.

The property distrained is to be kept safely (in England, *impounded*), and finally to be sold, in order that the proceeds may be applied in satisfaction of the arrears of rent due. Let us, therefore, advert to (1), The impounding of the distress, and (2), The sale of the things distrained;

W. C.

1^g. The *Impounding* of the Distress.

To *impound* is to put the thing distrained in some safe *place of deposit*, in order, at common law, to await the amends which it was expected the distress would compel the wrong-doer to make speedily; or by statute in England, as with us, to be kept in security until the same *can be sold*, the proceeds being applied, after paying the charges of the proceeding, to liquidate the demand for which the distress is made. This place of deposit is in England called a *pound* (*parcus*—an inclosed place), which may or may not be *covered*, and may be *public*, (that is, provided by public authority), or *special*, when employed by the distrainer, by his own election, and to suit his own convenience;

W. C.

1^h. Common *Pound-Overt*.

This is a pound or enclosure, *open overhead*, and established by *public authority* for common use. (3 Bl. Com. 12, 13.)

With us, the property distrained is to be kept by the officer wherever he thinks fit, only it must be kept *safely*, and must not be removed out of the county or corporation, unless when it be specially so provided by law. If it be live stock, it is the officer's duty to provide food and water, and whatever else is necessary for its well-being, as in case of execution, and the expense is paid out of the proceeds of sale. (V. C. 1873, c. 49, § 35.)

2^h. *Special Pound-Overt.*

This is an enclosure *open overhead*, like the former, but is one provided *specially for the occasion*. In England there is this difference between depositing living animals distrained, in a *common* and in a *special* pound-overt, that the owner, being bound to provide for them in either case, must, when they are in a *common pound*, take notice of it at his peril; whereas, if they are put into a *special pound*, the distrainer must give notice to the owner (3 Bl. Com. 13.)

This distinction is of no practical value with us, there being here no common pound, and it being the *officer's* duty in all cases to provide for the wants of animals distrained. (V. C. 1873, c. 49, § 35.)

3^h. *Pound-Covert.*

Goods liable to be stolen or injured by exposure to the weather, must be placed in a *covered pound* at the peril of the distrainer. With us, the care of the distress devolves on the *officer* in all cases, who must provide for its safe-keeping and protection, according to its character. (3 Bl. Com. 13.)

4^h. *Pound-Breach.*

Goods distrained being taken at common law without *judicial warrant*, are not in the *custody of the law* until they are *in the pound*. To rescue them before they get there is *justifiable*, if they are taken without cause and contrary to law; and is only the subject of a *private action* when the *distress is legal*. But when once impounded, they are in the *custody of the law*, and whether the distress were legal or not, to rescue them then is a high offence against *public justice*, under the name of *pound-breach*, and is visited with exemplary penalties. (3 Bl. Com. 12.) With us the goods, from the moment they are distrained, (being seized under a *judicial warrant*, by a *sworn officer*,) are in the *custody of the law*, and any rescue, though the distress were illegal,

would constitute an offence corresponding to *pound-breach*, and would be punished accordingly. (Min. Crim. Synops. 154; V. C. 1873, c. 190, § 30.)

2^s. The Sale of the Things Distrained.

At common law, as we have seen, *no sale is contemplated*. The things are distrained and kept merely as a *pledge*, and not as a *satisfaction*. But as well in England (by Stat. 2 W. & M. c. 5; 8 Anne, c. 14; 4 Geo. II, c. 28, &c.) as with us, the sale of things distrained for rent and for taxes, &c., has long been provided for, making the distress neither more nor less than a very *summary execution* against the goods. In Virginia, the mode of levying, keeping, and selling under a warrant of distress is very closely assimilated to an execution of *fiery facias* against a debtor's goods. (3 Bl. Com. 14; V. C. 1873, c. 49, § 35 & seq.)

We are to notice here, (1), When and where the sale is to be made, and with what notice; (2), The giving of a forthcoming or delivery bond.

1^h. When and Where the Sale is to be made, and with what Notice.

The officer is to appoint a time and place for the sale, and publish notice of the same at least *ten days*, at some place near the residence of the owner, (if he reside in the county or corporation), and at *two or more public places*, in the officer's county, city or district. (V. C. 1873, c. 49, § 36.)

If the goods be *mules, work-oxen, or horses*, (that is, any *work animals*), notice of the sale is to be published at the *door of the court-house* of the officer's county or corporation (on a court day), and the sale is to take place at the *court-house* of the county or corporation, on the *first day of the term* next succeeding *that at which* they were advertised, between the hours of *ten A. M. and four P. M.* (V. C. 1873, c. 49, § 36-'7.)

The sale is to be to the *highest bidder, for cash*; and if there is not time to complete the sale on the appointed day, it may be adjourned from day to day, until completed. (V. C. 1873, c. 49, § 36, 38.)

The requirement touching the sale of *work-animals* at the *court-house*, on a *court-day*, may be dispensed with *by the parties, in writing*, before the time for advertising the same; and then the sale is to be made as first above stated in the case of goods and chattels, other than *work-animals*. (V. C. 1873, c. 49, § 37.)

2^h. Delivery or Forthcoming Bond.

In case of a distress, as in the case of an execution of

fieri facias, the indulgence is allowed the debtor of a *Delivery or Forthcoming Bond*;

W. C.

1st. Nature of a *Delivery or Forthcoming Bond*.

When an officer levies a writ of *fieri facias* or a *distress-warrant*, he may take from the debtor a bond, with sufficient security, *payable to the creditor*, reciting the service of the writ or warrant, and the amount due thereon, (including his fee, and other lawful charges), with condition that the property shall be *forthcoming at the day and place of sale*; whereupon such property may be permitted to remain in the possession, and *at the risk of the debtor*. (V. C. 1873, c. 185, § 1; First Appendix to this work.)

If the condition be broken, by failure to deliver *every article* named in it, (however trivial in value), at the day and place of sale, and the amount due be not paid, the officer, *within thirty days* after the bond is forfeited, is to *return it to the court or clerk's office* (as prescribed by V. C. 1873, c. 49, § 27), where, as against the obligors therein *who are alive* when it is forfeited and *so returned*, it has the *force of a judgment*, although there can be *no execution thereon*, until it is awarded as presently to be mentioned. (V. C. 1873, c. 185, § 2, 3.)

2nd. Proceeding upon a *Forthcoming or Delivery Bond*.

The proceeding upon a forthcoming or delivery bond is by *action on the bond*, or motion, usually on *ten days' notice* for an *award of execution* thereon, the bond itself, it will be remembered, having, when returned to the clerk's office, the *force and effect of a judgment*, (V. C. 1873, c. 185, § 32; Id. c. 163, § 4); and the defendant may appear and *make defence* on the ground that the distress was for rent *not due, in whole or in part*, or was *otherwise illegal*. (V. C. 1873, c. 185, § 4.)

Under this statute the defence of *set-off* (that is of a *counter-demand* in the nature of a debt due from the landlord to the tenant) is admissible to be made by the tenant, on the landlord's motion on the forthcoming bond. (Allen v. Hart, 18 Grat. 722.)

See Goolsby v. Strother, 21 Grat. 107.

3rd. Nature and Effect of a *Replevy-Bond*.

A *replevy-bond* is unknown to the common law, but is of *statutory origin*. It was merely a bond with security conditioned to *pay the rent in three months*, whereupon the goods distrained were re-delivered to the owner, it being merely a device to give the tenant a breathing space of three months. It is to be distinguished, therefore, from the *replevin-bond*, which

obliged the obligor to *contest the legality of the distress* by the *writ of replevin*. Replevy-bonds long subsisted by our Virginia statutes, until they were superseded by forthcoming or delivery-bonds, as above described, by the Code of 1849, taking effect 1st July, 1850. Replevy (*re-plegiare*), it will be observed, is to return goods *upon pledges* (*plegii*), namely: *in replevin* to prosecute with effect a suit to try the legal right to distrain, and to perform the judgment of the court; and in the case of a *replevy-bond*, to pay the rent *in three months*, contesting nothing. (2 Tuck. Com. 12, 13.)

3^h. Penalty upon Landlord, &c., for Distraining, or for selling *where no Rent is due*.

The penalty is such damages as a jury may assess for the wrongful seizure, and also, if the property be sold, *for the sale thereof*. (V. C. 1873, c. 145, § 3.)

3^f. Circumstances which *make a Distress Voidable*; W. C.

1^s. Taking a Judgment (*but not a bond*), for the Rent.

The right to distrain is then *merged* in the superior right to issue execution *upon the judgment*. A *bond* for the rent, however, is not a security superior to the right to distrain, and therefore the right of distress is not merged in the bond. (Gage v. Acton, 1 Salk. 326; S. C. 1 Com. R. 67; Davis v. Gyde, 2 Ad. & El. (29 E. C. L.) 623.)

2^s. Distraining *Prematurely*.

Thus, as the rent is strictly not due until midnight of the day it is payable, a distress on that day is *premature*, and may be avoided. (3 Bl. Com. 11, n (27); 3 Th. Co. Lit. 254, n (c).) Hence it is laid down, as distress cannot at common law be made for rent *by night*, that it must be postponed until the *day after the rent is payable*. And that involves another consequence, namely, that seeing no distress can be *made at common law after the term ended*, if the rent were payable on the *last day* of the term, it could *not be distrained for at all*. (3 Th. Com. Lit. 254 & n (1).) It was, therefore, customary to make rent payable on some day prior to the last day, so as to allow of a distress. By *statute*, however, distress is allowed to be made notwithstanding *the term is ended*. (V. C. 173, c. 134, § 10; 8 Anne, c. 14; 3 Bl. Com. 11; 3 Th. Co. Lit. 255 & n (1) & (c).)

3^s. Distress after *Tender of the whole Rent*.

To distrain after a lawful tender of the whole rent is oppressive and vexatious, and renders the distress *avoidable*. (3 Bl. 11, n (27); Gilb. Rents, 103-4.)

As to what amounts to a lawful *tender*, see Bac. Abr. Tender; 2 Th. Co. Lit. 69 to 74, and notes; 3 do. 8, & n (8).

8°. The Parties *to and against whom* the Remedy by Distress and other Remedies for Rent are allowed; W. C.

1°. The Parties *to whom* Distress and other Remedies for Rent are allowed.

The general principle is, that any person *entitled to the rent* is also entitled, for the most part, to *any of the remedies therefor*, the rent generally following the reversion, and the remedy following the rent.

We are here to notice, (1), The doctrine as to the *lessor's right* to distress, and his right to other remedies; (2), As to the right of the *personal representative* of the lessor to distress and other remedies for rent; (3), As to the right of the *heir or devisee* of the lessor to distress and other remedies for rent; (4), As to the right of a husband, *jure mariti*, to distress and other remedies for rent; (5), As to the right of an *assignee of the reversion* to distress and other remedies for rent; and (6), As to the right of *joint-tenants and tenants in common of the reversion* to such remedies; W. C.

1°. Doctrine as to the *Lessor's* right of Distress, and his right to other Remedies.

Supposing the lessor not to have parted with his interest, either in the rent or in the reversion, he has always distress, and the other remedies, open to him; but if he has disposed of the *reversion*, he cannot, at common law, *distrain*, although the severance of the reversion from the rent does not affect his right to other remedies. In Virginia, by statute, *he to whom rent is due*, whatever the kind of rent, may recover it by *distress or action*, whether he *have the reversion or not*, and so may his personal representative or assignee. (V. C. 1873, c. 134, § 7, 8.)

2°. Doctrine as to the right of the *Personal Representative of the Lessor*, to Distress and other Remedies for Rent.

If the *personal representative* (i. e., the executor or administrator) of the lessor is entitled to the rent, he is with us entitled to *distress, &c.*, (V. C. 1873, c. 134, § 8), to recover it. At common law, his right to *distrain* depends on his *having the reversion* or not. As to the personal representative's right to the rent, to the arrears due at the lessor's death he is *always entitled*. Whether he is entitled to that which becomes due *after the lessor's death*, depends on whether he *succeeds to the reversion* or not. If the *reversion* passes from the lessor to *him*, the *rent* belongs to him also; otherwise, it belongs to the *heir or devisee*. (V. C. 1873, c. 134, § 8.)

3^d. Doctrine as to the right of the *Heir or Devisee of the Lessor*, to Distress and other Remedies for Rent.

As the rent follows the reversion, and the remedy the rent, when the lessor dies and leaves the reversion to pass by descent to *his heir*, or wills it to *his devisee*, the reversion being then in the heir or devisee, that party is the person entitled to the rent, and consequently to the remedy. But it will be remembered, that the arrears of rent *due at the lessor's death* go invariably to the *personal representative*, and the remedy goes with them. (V. C. 1873, c. 134, § 8.)

4^d. Doctrine as to the right of a Husband, *jure mariti*, to Distress, and other Remedies for Rent; W. C.

1^h. Arrears of Rent *due the wife at time of marriage*.

Such arrears are what are known as *choses in action* of the wife, and the husband is entitled at common law, *jure mariti*, to collect them during the coverture; and afterwards, if he survives, to collect them as his wife's *administrator*; and having paid her *ante-nuptial* debts out of them, the residue belongs to him as her *sole distributee*. If before the arrears are collected, the coverture determines by the husband's death, or by a divorce *a vinculo matrimonii*, the amount uncollected belongs to the wife. The remedy here, as in other cases, follows the right to the rent; but during the coverture, the proceeding for the arrears, whether by distress or otherwise, should be in the joint names of *husband and wife*. (V. C. 1873, c. 134, § 8.)

But it must be observed, that the common law touching the marital rights of the husband in his wife's property has been wholly revolutionized in Virginia by statute of 4th April, 1877, enacting that the property, real and personal, belonging to any woman at the time of her marriage, or acquired afterwards during the coverture, shall be her separate estate, free from the debts and control of her husband, which she may charge and dispose of, and in respect to which she may contract, and may sue and be sued as if she were a *feme sole*; save that her husband shall join in any contract touching her property, other than such as she may acquire as a *sole trader*; and shall be joined with her in any action by or against her. But she may charge her separate property, without her husband's concurrence, just as heretofore. And thus, whilst the husband gets nothing by his wife (save his *curtesy*), he is still liable for her support, and for any torts which she may commit. What will be the effect on the tranquility and virtue of the body politic of a law which so ruthlessly

invades that unity of interest and of sentiment which, for more than a thousand years, have made the homes of the Anglican nations the happiest, the most peaceful, and the most virtuous in the world, the philosophic speculator upon social forces must await with trembling apprehension. (Acts, 1876-'7, p. 333, c. 329.)

2^h. Rent which falls due *during the Coverture*.

In this case, the husband being at common law entitled in right of his wife to the reversion, is entitled also to the rent, and to the remedy therefor. Whether he shall prosecute the remedy in the *joint-names* of himself and his wife, or in his own name alone, depends on whether the wife's interest or *estate* in the land is a *freehold*, or only for a *term of years*. In the latter case (supposing the lease of the land to have been made by the husband alone), it is apprehended that the remedy can only be *in his own name*, and in the former (or in the latter, if the lease be made by husband and wife jointly), it must be, it is supposed, in the *joint names of both*. (3 Th. Co. Lit. 306-'7; But see 1 Bl. Com. 443, n' (44); 1 Chit. Pl. 34.) But this doctrine is now changed in Virginia, by the Act of 4th April, 1877, cited *supra* 1^h. (Acts, 1876-'7, p. 333, c. 329.)

3^h. Rent which falls due *after the Coverture is Terminated*.

In this case, which, if explained in detail, would require many distinctions, it will be best simply to observe the general rule, that the *rent follows the reversion*, and that the remedy goes with the rent. (2 Insts. Com. & Stat. Law, 47.)

5^s. Doctrine as to the Right of an *Assignee of the Reversion* to Distress, and other Remedies for Rent.

Rent, even at common law, always follows the reversion, when not expressly excepted upon an assignment of the reversion; and the remedy *by distress*, and it is believed by action or suit also, follows the rent. But it is not so with the remedy by *re-entry* for non-payment of the rent, when the payment was made a *condition* of continuing to enjoy the land, or where the right of re-entry for non-payment of the rent was *expressly reserved*. The common law permitted no one to take advantage of any right of re-entry by force of any condition, except the parties, and their heirs or personal representatives, and therefore no assignee or grantee of the reversion could do so; nor, on the other hand, could the grantee of the reversion be made liable at the instance of the tenant by virtue of any conditions or covenants. (2 Th. Co. Lit. 84 & seq.)

This defect of the common law was either not per-

ceived or not regarded, until after the breaking up of the monasteries and other religious houses, *temp.* Hen. VIII. The king, to whom the houses had transferred their lands, (generally in the hands of tenants on long leases, either for long terms for *years*, or for lives,) and the king's grantees found themselves so much pinched by the doctrine, that the statutes, 31 Hen. VIII, c. 13, and 32 Hen. VIII, c. 34, were enacted to meet the emergency, and thereby there was given to the assignees of the reversion, and to the tenants of the land reciprocally, all the benefits and all the remedies which the lessor and tenant mutually had against each other. (3 Bl. Com. 157; 2 Th. Co. Lit. 84 & seq, 88 & seq, & (M, 2), 109 & seq); and these statutes have been re-enacted in Virginia. (V. C. 1873, c. 134, § 1, 2.)

6^s. Doctrine as to the Right of *Joint-Tenants* and *Tenants in Common* of the Reversion, to Distress and other Remedies for Rent.

Joint-tenants have each an estate in the whole land and consequently an interest in the whole of the rent, and each may distrain for the whole, although it is more proper that they should join. *Tenants in common* having separate estates in the reversion must, at common law, distrain severally, each for his own share; but in Virginia they *may join*. (Bac. Abr. Distress, (A); 2 Bl. Com. 182, & n (11); Id. 194, n (29); V. C. 1873, c. 164, § 2.)

2^f. Parties *against whom* Remedies for Rent are Allowed; W. C.

1^s. The Lessee.

The Remedies for rent lie, for the most part, against the lessee, as well after his assignment of the premises as before, by virtue of *his express contract to pay*. It will be remembered, however, that in order to *distrain*, the goods must be either *on the leased premises*, or not removed therefrom *more than thirty days*. (V. C. 1873, c. 134, § 11.)

2^s. The Lessee's Personal Representatives.

For rent due and in arrear at lessee's death his executor or administrator is always liable, to the extent of the assets *which come to his hands*; and for such rent as accrues due afterwards the executor or administrator is also answerable, supposing the premises to pass to him; and for such arrears he is *answerable personally*, and not merely in his representative capacity. If the premises do not yield enough to pay the rent, he must resort to the general assets, and it is only where they too are exhausted, that he can compel the landlord to allow him

to relinquish the possession, and relieve himself from the *personal* obligation to pay. (2 Lom. Ex'ors, 441; Bac. Abr. Ex'ors, (P), 1.)

3^d. The Sub-Lessee.

A sub-lessee is liable to have his goods upon the leased premises *distrained* by the lessor or his assignee; but he is not liable to *any action*, at suit of the lessor or his assignee, for want of *privity of contract*. But this reason, of course, does not apply to his own *immediate lessor*, who may, therefore, both distrain upon him and sue him.

4^d. The Assignee of the Lessee.

An assignee of the premises leased is liable to pay the rent, and is subject to *all the remedies* therefor, as long as he *remains in possession*; but in the absence of any express promise on his part, he is in general *liable no longer*. Whilst, therefore, the lessee in no wise evades his obligation by abandoning the land, as soon as the *assignee* quits the premises, he ceases to be answerable to pay any rent, unless by special contract. The *sub-lessee*, as we have seen, is subject to *distress* for rent, but not to *an action* at the suit of the lessors for want of *privity*. The *assignee*, on the other hand, standing in *privity*, as he does with the lessor, and the lessor's assignee, may not only be *distrained* upon, but *may be sued* by either of them for any arrears of rent due from him.

It seems, comparing the common law with our statute, (V. C. 1873, c. 134, § 11; *Ante*, p. 107, 1^h and 2^h), that the chattels of the assignee and sub-lessee are liable to be distrained for rent due from the lessee, notwithstanding they may have already paid to *him* the rent they stipulated to pay.

The statute of Virginia, it may be observed, whilst it recognizes the assignee's obligation for rent in general, expressly declares that he shall not be liable for rent which became due *before his interest began*. (V. C. 1873, c. 134, § 1, 9.)

5^d. The Lessee's *Heirs or Devisees*.

For rent due and in arrear at lessee's death, his personal representative, as we have seen, is *primarily* liable, to the extent of the assets in his hands; but if the *personal assets* prove deficient, the *heirs and devisees* may be subjected, to the extent of the *real estate* which may come to them from him, just as they may be for other debts of their ancestor or deviser. (V. C. 1873, c. 134, § 9; *Id.* c. 127, § 3.)

For rent which accrues due *after the decedent's death*,

the liability of the heir or devisee depends on whether the land *passes to him* on that event, or not. If the land comes to him, he must pay the rent afterwards accruing, otherwise not. And if liable at all, it will be observed that he is liable *personally* and *primarily*.

9°. Other Remedies for Rent *besides Distress*.

The other remedies for rent, *besides distress*, may be ranked as: (1), Summary; and (2), By suit or action; W. C.

1°. *Summary Remedies* for Rent other than Distress; W. C.

1°. Attachment for Rent.

The remedy by attachment is *statutory* and supplemental to distress; being intended to meet the case where the lessee or occupant of the land removes his effects from the leased premises *before the rent becomes due*, and where, therefore, distress cannot be resorted to. The statute provides that where the lessor, or his agent, shall make complaint *on oath* to a *justice of the peace*, that *any person liable to him for rent intends to remove, is removing, or has within thirty days removed his effects from the leased premises*, to the best of his belief, and shall state also on oath, to the best of his belief, the amount of rent *which is reserved* (whether in money or other thing), and which will be *payable within one year*, and the time or times when it will be so payable, and either that there *is not*, or he believes, unless an attachment issues, there *will not be left on the premises* property liable to distress sufficient to satisfy the rent so to become payable, such justice shall issue an attachment for the said rent, against such goods *as might be distrained* for the same if it had become payable, and against *any other estate* of the person so liable therefor. (V. C. 1873, c. 148, § 4.)

The attachment is *directed* to the sheriff, sergeant, or constable of any county or corporation, and commands the officer to attach such goods of the party against whom it is awarded, as might be distrained for the said rent if it were then payable, and any other estate of that party, or so much thereof as will be sufficient to satisfy the rent named, and so to secure the goods and estate attached, that the same may be liable to further proceedings to be thereon had at the court to which the attachment is returnable. (V. C. 1873, c. 148, § 6; Mayo's Guide, 568-9; Dan. Attach'ts, p. 62, 236.)

The attachment *may be levied* upon *any estate, real or personal*, of the defendant, including, therefore, a vast deal more than might be distrained; and is *sufficiently levied* by the service of a copy of it on *such persons* as may be designated by the plaintiff, in writing, or be

known to the officers to be in possession of effects of, or to be indebted to, the defendant; and as to *real estate*, by its being *mentioned and described* by endorsement on the attachment. (V. C. 1873, c. 148, § 7.)

As to the *disposal of the property* after it is levied upon, if the plaintiff, when he sues out the attachment, or afterwards give bond with security satisfactory to the justice who issues the attachment, in a penalty of double the amount of the rent, conditioned to pay all costs and damages which may be awarded against him by reason of his suing out of the attachment, the officer is to *take possession* of the property attached, (V. C. 1873, c. 148, § 8.) And when thus taken into possession, it may be *replevied* by the defendant, either by giving a bond (with good security, of course) conditioned to *perform the judgment of the court* (in which case the property is released from the attachment); or by giving a *forthcoming or delivery bond* with condition to have the property attached *forthcoming at such time and place as the court may require*, the nature of which latter bond, and the proceedings thereon, have been already explained. (*Ante* p. 116-'17.)

The attachment may be *issued and executed on Sunday* (which, for most purposes, is *dies nonjuridicus*), if *oath be made* that defendant is *actually removing his effects on that day*. (V. C. 1873, c. 148, § 10.)

It is *returnable*, when the amount is *over twenty dollars* (exclusive of interest), at the option of the plaintiff, to the next term of the *circuit, county or corporation court* of the county or corporation in which is the leased tenement. And the judge of the *circuit court*, (and it is apprehended, of the *corporation court also*, V. C. 1873, c. 154, § 38), or any other circuit (or corporation) court judge, may *in vacation*, on ten days' notice to the attaching creditor, hear testimony, and if he be of the opinion that the attachment was sued out without sufficient cause, may quash or dismiss it. (V. C. 1873, c. 148, § 6.)

If the amount of the rent is *not over twenty dollars* (*exclusive of interest*), the statute has omitted expressly to say where the attachment shall be *returnable*. Doubtless it was designed to be in that case returnable before a *justice of the peace*, as in case of a *warrant*. (See V. C. 1873, c. 147, § 1; *Id.* c. 56, § 32,) but some further legislation in this particular seems to be required.

Property seized under attachment, if *expensive to keep or perishable*, may be sold by order of court, or if it be a circuit court or the chancery court of the city of Richmond, by order of the judge in vacation, and the proceeds

secured to await the issue of the cause. (V. C. 1873, c. 148, § 16.)

The *garnishees* (*i. e.* the persons who have been summoned to answer, upon the supposition that they owe the defendant money, or have got effects belonging to him in their possession), are compellable to appear, and to say *how much they owe* to the defendant, or *what goods they have* belonging to him, and then to pay and deliver the same; to ensure which various provisions are made. (V. C. 1873, c. 148, § 17 & seq.)

Defence to the attachment may be made by any defendant thereto; or by any garnishee or any party to any forthcoming or replevy bond given as above described; or by the officer who is liable to the plaintiff in consequence of his taking an insufficient bond; but the attachment is not thereby discharged, nor the property levied on released. The defence may, (1), Contest the right to sue out the attachment; or (2), Contest the case *upon its merits*. Upon the *first ground* of defence, if the court is of the opinion that it was issued upon *false suggestions*, or without sufficient cause, judgment shall be entered that the attachment be *abated*. Upon *the merits*, if the court be of opinion that the claim of the plaintiff is not established, *final judgment shall be given for the defendant*; in either case *with costs*, and an order for the restoration of the attached effects. (V. C. 1873, c. 148, § 21, 22.)

If the plaintiff's claim be established, (supposing the first defence above indicated to be overruled), judgment is rendered for him, and the effects attached are ordered to be sold, and the proceeds applied in satisfaction of the judgment. But no real estate is to be sold until all the other property and money attached has been exhausted. But if the defendant has not appeared, or been served with a copy of the attachment sixty days before the judgment, no sale can take place until the plaintiff give bond with security to perform such future order as may be made upon the appearance of the defendant, and his making defence. And if the plaintiff fail to give such bond in a reasonable time, the court *shall dispose of the estate attached*, or the proceeds thereof, as to it shall seem best. (V. C. 1873, c. 148, § 23, 24.)

Any third person who claims the property attached, or any lien thereon by a prior attachment or otherwise, may intervene by petition, and assert his rights at any time before the property attached is sold, or the proceeds paid to the plaintiff. (V. C. 1873, c. 148, § 25.)

It is important to observe, and should have been mentioned before, that the statute gives a *lien* from *the time*

of *levying* the attachment, (or serving a copy, as above described *on the garnishees*), upon the *personal property* in possession, or in action, and on any *real estate* mentioned in an endorsement on the attachment (but on none other not so mentioned,) from the *suing out of the same*, (V. C. 1873, c. 148, § 12); and as between *several* attachments that first served is to have *priority* of lien. (V. C. 1873, c. 148, § 26; *Farmers' B'k v. Day*, 6 Grat. 360; *Caperton v. McCorkle*, 5 Grat. 177; *Haffey v. Miller*, 6 Grat. 454; *Williamson v. Gayle*, 7 Grat. 152; *Moore v. Holt*, 10 Grat. 284; *Clark v. Ward*, 12 Grat. 440; *Puryear v. Taylor*, 12 Grat. 401; *Smith v. Smith*, 19 Grat. 545.)

2^s. Re-Entry upon the Lands.

If the reservation of the rent is *by way of condition* (e. g. "Demise of Black-acre for fifty years to A, *on condition* that annually, at Christmas, he shall pay a rent of five hundred dollars,) the right to re-enter on the land if the rent be not punctually paid every year, follows by law as of course. If the rent be merely *reserved* (which is the act of the *lessor*) or if the tenant merely *covenants* to pay it, no right to re-enter ensues at common law, unless it be expressly stipulated for, (2 Th. Co. Lit. 4 & seq. 9, 103). But, in Virginia, it is provided by statute (V. C. 1873, c. 134, § 6), that, whenever the tenant deserts the demised premises, and leaves them *uncultivated or unoccupied*, without goods thereon subject to distress, sufficient to satisfy the rent due, the lessor, after *one month's notice* posted upon a conspicuous part of the premises *may re-enter*, and put an end to the tenant's right, allowing the landlord, however, to recover the rent up to that time. And in cities and towns such recovery may be had upon continuance of default in the payment of rent for *five days* after notice *in writing* requiring possession of the premises. (V. C. 1873, c. 130, § 4.)

At common law the re-entry must *actually have been made* by the lessor or his agent, before he could maintain an action for the land, although in process of time, when ejectment was the action instituted, the *entry* admitted by the defendant upon the *consent-rule* was indulgently allowed to be the *re-entry* required. (3 Th. Co. Lit. 15, n (I); *Oates v. Brigden*, 3 Burr. 1897; *Goodright v. Cator*, 2 Dougl. 484.)

In Virginia, (where the *consent-rule* is abolished,) provision is made for the lessor's maintaining an action to recover the land without any previous *actual entry*. (V. C. 1873, c. 134, § 16 & seq.)

3^s. *Nomine Pæne*.

A *nomine pœnæ* (in the name of a penalty,) is only a penalty stipulated to be paid by the tenant in the event of the non-payment of the rent; and it is difficult to conceive with what propriety it can be classed amongst remedies for rent, as it universally is. (Gilb. Rents, 140, &c.)

2^d. Remedies for Rent by *Action or Suit*.

These remedies are, (1), By *action* at common law; and (2), By *suit* in equity;
W. C.

1^s. Remedies by *Action at Common Law*.

The Remedies by action at common law, are (1), Real actions; and (2), Personal actions;
W. C.

1^h. Real Actions.

Real actions to recover rent are not used in practice in Virginia, but they are *not abolished*. They are designed to bring directly into question, and to determine the right to a freehold rent, and not merely nor principally to recover the arrears due. In case of a *rent-seck*, the common law affords no other means to charge the rent directly upon the land, save by the real action of *assise of mort d'ancestor*, or *novel disseisin*, as the case may be. (3 Bl. Com. 232-'3; Gilb. Rents, 106.)

Real actions to recover rent are appropriate only when the estate therein is a *freehold*, that is, of indefinite duration; e. g., for life, in fee-simple, &c. And the idea once prevailed, very erroneously however, that the arrears of a freehold rent could be recovered by a real action alone, and not by personal actions.

The real actions for the recovery of rent are, (1), The writ of assise; (2), The writ *de consuetudinibus et servitiis*; (3), The writ of *Cessavit*; and (4), The writ right *sur disclaimer*;

W. C.

1¹. Writ of Assise of *Mort D'Ancestor* or *Novel Disseisin*.

This is a still subsisting action in Virginia, (V. C. 1873, c. 15, § 2,) although *disused*. Where rent granted is in arrear, and no sufficient distress is found on the premises, it might be sometimes used to advantage, in order to charge the arrears due, *specifically* upon the land out of which the rent issues.

See Gilb. Rents, 100, 106.

2¹. Writ *de Consuetudinibus et Servitiis*.

This remedy lies for the lord against a tenant who withholds from him the rents and services due by custom or tenure for his land. It has the advantage of compelling a specific payment or performance of the

rent or service. If the *custom* alluded to be a *local law*, as is supposed, there can be no rent or service due thereby with us, (2 Insts. Com. & Stat. Law, 34,) nor is there in Virginia any *feudal tenure*. (2 Insts. Com. & Stat. Law, 71.) It seems, therefore, that there cannot be here any rents or services to which this writ is applicable. See 2 Bl. Com. 232.

3^d. Writ of *Cessavit*.

This writ is given by the statutes of Gloucester, (6 Edw. I, c. 4,) and of Westm. II, (13 Edw. I, c. 21 and 41,) whereby, when one who holds lands in fee of a lord, by rent or other service, neglects or ceases to perform his services for *two years together*, the lord shall have a writ of *cessavit* to recover the *land itself*, *eo quod tenens in faciendis servitiis per biennium jam cessavit*. (2 Bl. Com. 232 & seq; 1 Th. Co. Lit. 180, n, (O); Id. 440, & n, (2).)

These statutes do not themselves exist in Virginia, but the writ which they give is *reserved to our people*, (V. C. 1873, c. 15, § 2,) although it is *in practice* out of use. But the need of a similar remedy has constrained the legislature to devise several which meet the exigency in an analogous way. Thus it is provided, as we have seen, that wherever the tenant deserts the premises, and leaves them *uncultivated or unoccupied*, without goods thereon subject to distress sufficient to satisfy *the rent due*, the lessor, after *one month's notice*, posted upon a conspicuous part of the premises, *may re-enter*, and put an *end to the tenant's right*. (V. C. 1873, c. 134, § 6.) And by other sections of the same chapter (V. C. 1873, c. 134, § 16, 17, &c,) it is further provided, that any who shall have a *right of re-entry* into lands, by reason of any rent issuing thereout, being in arrear, &c., may serve a declaration *in ejectment* on the tenant in possession, or, if there be none, may affix the declaration upon the *chief door* of any messuage (dwelling-house), or at any other notorious place on the premises, which service shall *be in lieu of a demand and re-entry*; and upon proof to the court, by affidavit, in case of judgment by default, or upon proof on the trial that the rent claimed was due, and no sufficient distress was upon the premises, or that the covenant or condition was broken before the service of the declaration, and that the plaintiff *had power thereupon to re-enter*, he shall recover judgment, and have execution for such lands; and should the defendant not pay the rent in arrear, with interest and costs, nor file a bill in equity for relief against the forfeiture within *twelve*

calender months after execution executed, he shall be barred of all right in law or equity to be restored to such lands. And so it is also provided that in a *town or city* the lessor may recover the premises where a default in the payment of rent shall continue for *five days* after notice *in writing* to give up the possession or to pay the rent. (V. C. 1873, c. 130, § 4.)

4¹. Writ of Right *Sur Disclaim*er.

This is a writ provided by the common law, for those cases where the tenant *disclaims* in a *court of record*, to hold of his lord, and it enables the lord, upon proof of the tenure, *to recover the land* so holden, as a punishment to the tenant for his false disclaimer. It seems to be the better opinion that a similar forfeiture for a like offence exists in Virginia. (1 Lom. Dig. 593, 821; 2 Insts. Com. & Stat. Law, 100, 226.) It may be doubted, however, whether the forfeiture can be enforced with us by this writ, in consequence of the statute (V. C. 1873, c. 131, § 38), which declares that "*no writ of right, &c.*, shall be brought after the commencement of this Act," viz: July 1, 1850. But the land forfeited may, no doubt, be recovered by *ejectment*. (V. C. 1873, c. 131, § 2, 14.)

2^h. Personal Actions.

See 3 Bl. Com. 231.

The personal actions have almost entirely taken the place of real actions, to enforce the payment of arrears of rent. The personal actions employed for the purpose are, (1), Debt; (2), Trespass on the case in *assumpsit*; (3), Covenant; (4), Account.

A remarkable doubt, as already intimated, was long cherished in England, whether a *personal action* could be maintained for the *arrears of a freehold rent*, the idea being that such arrears, like a freehold estate in land, could be recovered only by a *real action*, thus confounding the *profits of the rent* (which are as much personalty as wheat or corn severed from the land) with the *rent itself*. A similar fallacy occurs in *Miller v. Marshall & als*, 1 Va. Cas. 158, wherein it was held that a *justice of the peace* could not give judgment for the arrears of a *rent in fee*. (3 Bl. Com. 232.) Accordingly, statutes were enacted in England to allow *actions of debt* to recover the arrears of *freehold rents*. (8 Anne, c. 14; and 5 Geo. III, c. 17.) And in Virginia, a corresponding provision exists (V. C. 1873, c. 134, § 7), declaring that "*rent of every kind* may be recovered by distress or *action*," without limiting it to the *action of debt*, or other personal action;

W. C.

1¹. Action of Debt.

The action of debt lies to recover the arrears of rent due, whether the estate in the rent be an estate *for years*, or an estate *of freehold*, the general principle being that debt lies to recover *any sum of money* where the *amount is certain*, and the *liability is certain*, or is *capable of being made certain*.

As to the *amount* to be recovered, the common law allowed no interest on rent, nor on any other subject, as we have seen, unless such interest was *contracted for* expressly, or by implication, or where from peculiar circumstances to be determined by the discretion of the court or jury, *justice required* that interest should be allowed. (*Skipwith v. Clinch*, 2 Call. 253; *Cook v. Wise*, 3 H. & M. 463; *Id.* 470; *Dow v. Adam's Adm'r*, 5 Munf. 21; *Michie v. Lawrence*, 5 Rand. 571.) But in Virginia, by statute, interest is recovered "*in any action for rent*," as on other contracts. (V. C. 1873, c. 134, § 7; *Id.* c. 173, § 14);

W. C.

1². Doctrine at Common Law, in respect to the *Action of Debt for Rent*.

Practically, the action was confined to recover arrears of rent in cases where the estate in the rent *was for years only*. If the estate in the rent was *of freehold*, it was doubted (but, as we have seen, without just reason), whether *any personal action would lie for the arrears*, upon the remarkable ground that it was not fitting that a *personal action* should be employed to *recover a freehold*. So that in practice, in consequence of that doubt, the *real actions* already indicated were resorted to in order to recover the arrears of freehold rents, wherever a distress was inapplicable. And so it was until Stats. 8 Anne, c. 14, & 5 Geo. III, c. 17, expressly provided for the action of debt in such cases.

2². Doctrine by Statute in Virginia, touching the *Action of Debt for Rent*.

It is provided by statute with us, that "rent of *every kind*, may be recovered by distress or *action*," which undoubtedly means a *personal action*, and of course includes *debt* along with others. (V. C. 1873, c. 134, § 7.)

2¹. Action of *Trespass on the Case in Assumpsit*.

This action is appropriate to recover the arrears of rent, wherever the promise to pay the rent is *not under the seal of the promisor*; and may be maintained whether the promise is *expressed or implied*.

The action proceeds upon the idea that the party to pay the rent, having broken his promise to pay, ought to be required to pay to the promisee such damages as will indemnify him for the breach, the measure of which is *the rent, with interest from the time it was payable*.

The lease may be under the *lessor's seal*, reserving rent, and still the action of trespass on the case in assumpsit lies, if it be not also under the *seal of the lessee*. His acceptance of the lease, and entering on the land in pursuance of it, is an *implication* of a promise by him to pay. Debt and assumpsit are, therefore, concurrent remedies for rent, where the lessee's promise to pay it is *not under his seal*. (1 Chit. Pl. 120, 376-'7.)

It was formerly considered that assumpsit lay only where the promise to pay the rent was *express*, and not where it was *implied*; but such a distinction is obviated in England, (if indeed it was ever fairly recognized there), by the Stat 11 Geo. II, c. 19, and in Virginia, it has never been admitted. (*Eppes' Ex'or v. Cole & ux*, 4 H. & M. 161; *Sutton v. Mandeville*, 1 Munf. 407);

W. C.

- 1*. Trespass on the Case in Assumpsit upon the ground of Contract express or implied, *to pay Rent*.

The arrears due are, in this case, recovered *as rent, eo nomine*, having all the attributes and incidents which *belong to rent*.

- 2*. Trespass on the Case in Assumpsit, to recover Compensation for the *Use and Occupation* of land where there is *no Contract, express or implied, to pay a certain sum*.

The plaintiff in this case recovers upon a promise express or implied, to pay, *not a sum certain*, for then it would be *rent*, but such an amount as will fairly compensate the proprietor for the *use and occupation* of his land; and the action proposes to recover damages for the breach of this engagement, such as a jury shall esteem an equivalent for such use and occupation. This being the character of the action, it was (not illogically) concluded, that if an action for *use and occupation* were instituted, and at the trial it appeared that there was a *contract, express or implied, to pay a determinate sum*, the *plaintiff must fail*. But this doctrine, which, however logical, was yet inconvenient, our courts repudiated as not maintainable at common law (*Eppes' Ex'ors v. Cole & ux*, 4 H. & M. 161; *Sutton v. Mandeville*, 1 Munf. 407),

and our statutes now (following Stat. 11 Geo. II, c. 19) provide, that where the agreement is *not by deed* a landlord may by action recover a *reasonable* satisfaction for the use and occupation of lands; and if on the trial, any parol demise, or any agreement *not by deed*, wherein a *certain rent* was reserved, shall appear in evidence, the plaintiff shall not therefor be *non-suited*, but may use the same as evidence of the amount of his debt or damages. (V. C. 1873, c. 134, § 7.)

It must be observed, that as the action *for use and occupation* is always founded on the idea of a *contract*, express or implied, to pay a reasonable compensation for such use, so it has ever been held that, if it appears at the trial that the occupancy of the lands was by a title *adverse to that of the plaintiff*, it defeated the action, by disproving the existence of any contract.

3^d. Action of Covenant.

This action is appropriate to recover damages for the breach of a contract *under seal*, whether to *pay money*, or to *do a collateral thing*. Hence, it is fitted to recover the arrears of rent whenever the promise to pay it is *under the seal of the promisor*, and in such case only, just as assumpsit is fitted to accomplish a similar function, when the promise to pay the rent is *not under seal*. And as in this latter case (where the promise to pay the rent is *not under seal*), debt and assumpsit are concurrent remedies; so in the former, (where the promise is *under seal*), debt and covenant are concurrent. It is apparent, however, that covenant and assumpsit, although both, under different circumstances, are *concurrent with debt*, can never be concurrent *with one another*. (1 Chit. Pl. 131, 133-'4.)

The *measure of damages* in the action of covenant for rent is always, as in assumpsit, the *amount of the rent due*, with interest from the time when it was payable.

4^d. Action of Account.

If rent be claimed by the landlord on one side, and counter-demands be set up on the other, the action of *account* (or *accountt*, as it was formerly spelled), may sometimes be maintained as well as in other cases of *mutual debts*, although, considering the inconveniences and delays which attend that action, a prudent landlord might well hesitate to resort to it, and would choose rather to employ, in such a case of mutual demands, a *bill in equity*, which lies in general, whenever an action of account lies, and indeed, in all cases

of mutual demands. (3 Rob. Pr. (2d ed.) 410 & seq; Bac. Abr. Accompt. 1 Stor. Eq. § 441 & seq.)

2^s. Remedy for Rent *by Suit in Equity*.

Equity exercises its extraordinary jurisdiction for the recovery of arrears of rent upon the same principles which usually control its action, namely, the *want of an adequate remedy at law*. The circumstances which prevent or obstruct the ordinary legal remedies are too numerous to be mentioned here; although, in another place, they will be pretty fully treated. Let it suffice to state, as an example of this equity-cognizance, the case of a *cestui que trust*, to whom or for whose benefit rent accrues, when there is *no trustee*, and the right of distress is unavailing. The *cestui que trust* can maintain no action *at law*, because he has *not the legal title*, and he must therefore seek redress in a court of chancery. (1 Stor. Eq. § 508 & seq; 684 & seq; Ad. Eq. 447-'8; 2 Rob. Pr. (1st ed.) 164; *Graham v. Woodson*, 2 Call. 249.)

CHAPTER II.

2^a. Redress of Injuries effected *by the joint act of all the Parties*.

There are two modes of effecting redress by the *joint act of all the parties*, namely:

(1), By *Accord and Satisfaction*.

(2), By *Arbitration and Award*.

W. C.

1^b. Redress effected by *Accord and Satisfaction*.

Accord and satisfaction would be more properly designated *satisfaction by accord*, or *agreement of the parties*, being something which they *agree to take as satisfaction* for the wrong, although not *intrinsically* and *per se* a satisfaction;

W. C.

1^c. What is meant by *Accord and Satisfaction*.

When parties who have a controversy mutually agree, the one to make or give, and the other to receive something, (money, property, or act done,) *in satisfaction of the injury*, the wrong is then wiped out; it is *satisfied*; and the right of action for it is gone. Albeit it may be that out of the transaction, designed as a satisfaction of the original wrong, a *new cause of action* may arise. Such an arrangement between parties as is above described is known as *accord and satisfaction*; and satisfying as it does the injury in question, is a complete answer, as just intimated, to any action therefor. (3 B. Com. 16; Bac. Abr. Accord, &c.)

2^c. What constitutes a good *Accord and Satisfaction*.

See Bac. Abr. Accord, &c. (A).

W. C.

- 1^d. The Debt, Duty, Demand, or Action which may be Satisfied.

See Bac. Abr. Accord, &c. (B).

W. C.

- 1^o. The Demand or Cause of Action must relate to Rights touching *the Person*, or *Personal Property*, and *not to Freehold Estates in Lands*.

It is a maxim in law, that a *freehold title* to lands can never be barred by a *collateral satisfaction*; a maxim originating partly in the reverend esteem in which the common law holds a *freehold*, and partly in the consideration that to allow a freehold to be so barred would trench upon that fundamental principle of landed property, that no freehold shall be passed from one to another save by *livery of seisin*.

- 2^o. The Demand, &c., to be satisfied must be an *existing Demand*, and not one *to arise in future*.

Hence it is said, that if it be agreed between parties to a contract that, in the event of a *future breach* thereof, a collateral satisfaction shall be accepted for such breach, such agreement, though the stipulated satisfaction were made, avails nothing, and the party aggrieved may still maintain an action for the breach, and *accord and satisfaction* is no plea thereto. (2 Pars. Cont. 209: Aldon v. Blague, 3 Cro. (Jac.) 100; Kaye v. Waghorn, 1 Taunt. 429.) It is also said, however, that a satisfaction thus agreed in advance to be accepted, and *actually made*, will be made good and available *in equity*.

- 2^d. The *Value and Kind of Satisfaction* Required; W. C.

- 1^o. Must be Something *Certain*, and *Definite*, and *Legal*.

Hence in an action for assault and false imprisonment against a justice of the peace, a plea that plaintiff was committed by defendant upon a criminal charge, and afterwards, by agreement between plaintiff and prosecutor, with *consent of defendant*, was discharged from confinement in *full satisfaction* of the assault and imprisonment, and plaintiff accepted such discharge *in satisfaction*, was held bad, because the satisfaction was *not legal*. (Bac. Abr. Accord. &c. A); Edgecomb v. Rodd & als, 5 East. 294.)

- 2^o. Must be *Reasonable and Good* as a Satisfaction.

Thus payment of a *less sum*, at the *time and place* where a *greater is due*, never can be satisfaction of the greater sum, there being *no consideration* for giving up the rest of the debt. (Bac. Abr. Accord. (A); Purvial's case, 5 Co. 117; Cumber v. Wane (1 Stra. 425); 1 Smith's L. C. 221 & seq.) But where a difference is made in point of *time, place and other circumstances*, which may be supposed to be a *consideration* for the relinquishment of the demand, it may be a good satisfaction. So taking a *higher security*,

or a *different security*, such as another bond, &c., or a negotiable note for even a less sum, may be a *satisfaction*. (Bac. Abr. Accord, (A); Brooks v. White, 2 Mete, 283; Goodman v. Smith, 18 Pick. 414; Sibree v. Tripp, 15 M & W. 22; Wells v. Drake, 1 Carr & P. (12 E. C. L.) 557.

3°. May be *by one*, or *by all* of several bound or liable, *to one* or *to all* of several Persons Aggrieved.

See Ruble v. Turner & als, 2 H & M. 38; Ammonett v. Harris, 1 H. & M. 488; 7 Rob. Pr. 544 & seq.

4°. Must be *Executed*, and *not merely Executory*.

This is not to be understood to signify that an executory contract may not be a satisfaction by the agreement of the parties, but what is meant is, that a satisfaction agreed upon must be *fulfilled or performed*, in order that it may be a satisfaction. Thus, if the debtor proposes to satisfy the debt, not with money, but *with property*, which the creditor agrees to accept *in satisfaction*, but the property is not delivered in pursuance of the *accord*, it is no satisfaction, and an action may be brought on the original demand, to which the agreement is no answer. On the other hand, if the debtor proposes to satisfy the debt *by a new promise*, say by himself and another, to be performed *at a future time*, to which the creditor agrees, such promise is an *executed-satisfaction*, although it is itself executory, and the original debt is *extinguished*. (Bac. Abr. Accord, and Satisfaction, (A); 7 Rob. Pr. 531-2; Cumber v. Wane, 1 Sm. L. C. 324.)

A satisfaction executory is founded on no valuable consideration, and so is *nudum pactum*. Hence it is that it does not avail as a *satisfaction*. It is, besides, not deemed politic thus to heap one cause of litigation on another. (4 Rob. Pr. 226.)

It will be observed that bonds, notes, and bills, are sometimes assigned *in satisfaction* of a demand, (and if accepted as such, it is a good *satisfaction*), and sometimes only as *collateral security*, in which latter case, of course, the assignment is not of itself a defence to an action for the debt. Whether the assignment is a satisfaction or a collateral security only, depends on the terms of the transaction. (Chit. Cont. 763; Cumber v. Wane, 2 Sm. L. C. 330 & seq.)

3^d. Acceptance as Satisfaction; W. C.

1°. Must be an actual Acceptance, and *not a mere agreement to Accept*.

2°. Must be an Actual Performance of Satisfaction, and *not a mere agreement to Perform*.

3°. Must be a Satisfaction of the *whole Demand*, and *not merely of a part of it*.

This is no more than an affirmance of the axiom that a

defence which does not go to the whole action is no bar to the action.

The satisfaction, if actually rendered, although no bar to the action, might still be a defence *pro tanto*.

- 4°. Difference in respect to deeds, before and after Breach respectively.

When a duty which is *certain* accrues by the deed, *tempore confectionis scripti*, as by covenant or obligation to pay a certain sum of money, this certain duty takes its essence originally and only *by the writing*, and, therefore, ought to be avoided by matter of *as high a nature*, though the duty be merely in the personalty. (Blake's Case, 6 Co. 43 b; Neal v. Sheffield, 3 Cro. (Jac.) 254.) And, therefore, accord and satisfaction made *before breach* of a covenant under seal cannot be pleaded in bar of an action on the covenant. (Kaye v. Waghorn, 1 Taunt. 428; Bac. Abr. Accord, &c. (B); Cumber v. Wayne, 1 Smith's L. C. 326-'7.)

- 3°. Mode of Pleading Accord and Satisfaction.

The best and safest way, says Lord Coke, to plead an accord, is to plead it by way of *satisfaction*, and not by way of *accord*; for if it be pleaded by way of *accord*, a precise execution thereof in every part must be pleaded; and if there be a failure in any part, the plea is insufficient; but if it is pleaded by way of *satisfaction*, the defendant need plead no more, but that he paid the plaintiff 10s. (or whatever it be), in full satisfaction for the action, which sum *he received*. (Peytoe's Case, 9 Co. 80 b; 7 Rob. Pr. 551, &c.; Bac. Abr. Accord, &c. (C).) It is customary, however, and it is believed safer to allege, (1), The accord or agreement; (2), The satisfaction performed in pursuance of the accord; and (3), The acceptance of the satisfaction as such. (7 Rob. Pr. 552 & seq; Sibree v. Tripp, 15 M. & W. 23; Curlewise v. Clark, 3 W. H. & G. 375; Boosy v. Wood, 3 Hurlst. & Colt, 484.)

- 2°. Redress of Injuries effected by *Arbitrament and Award*.

Arbitrament and award is where the parties, injuring and injured, submit all matters in dispute concerning *any property, real or personal, or any wrong or injury* to the judgment of one or more persons (called *arbitrators*), who are to decide the controversy; and if, as is usual, there be two or more of them, and they do not agree (as in practice they are pretty sure not to do), it is usual to add that another person shall be called in as *umpire (impar)*, to whose sole judgment it is then referred. The *award* is the decision pronounced by these domestic *judges of the parties' own choosing*; which latter phrase has so captivated the judicial fancy, as well in England as in America, as to call forth upon this mode of redress, from *judges*, more encomiums than the *practitioners of the law* are prepared to ratify. If arbitrators were always, or generally selected with reference to their discreet judgment, and firm determination to

decide fearlessly, with regard to justice only, the cheapness and facility of the proceeding might recommend it to frequent adoption. But it is but too notorious that, for the most part, arbitrators are the *friends* of the parties respectively, and that they frequently exhibit more of the zeal of partizans than of the impartial candor of judges; and who either fail to agree, or if they agree, seek to satisfy both contestants by dividing the subject between them. What else, indeed, could be expected from "*judges of the parties' own choosing*?" According to the experience of the writer, arbitration aggravates, embitters, complicates, and protracts strife, more than it tends peaceably and satisfactorily to adjust it. There are certainly cases where a judicious legal adviser might properly recommend it, but they will not often recur; and when they do, the result will frequently give occasion to the parties to deplore their resort to this "peaceable and domestic tribunal." (3 Bl. Com. 16; Bac. Abr. Arbitrament and Award.)

See Lord Eldon's similar doubts, *Street v. Rigby*, 6 Ves. 818.

Let it be observed, however, that *the law* attaches much value to this mode of deciding disputes, and regards the determination of the arbitrators with extraordinary favor, as we shall presently see. At present, it suffices to say, that a valid award, in pursuance of the submission, *extinguishes the original cause of action*, and thence forward, the remedy can be only *upon the award*. (Bac. Abr. Arbitrament, &c., (F); 7 Rob. Fr. 488 & seq;

W. C.

1°. The Parties to an Arbitrament.

The submission to the arbitrament of chosen friends being neither more nor less than *an agreement*, the parties to it must be *competent to contract*. Hence, married women and persons wanting in understanding, such as infants, lunatics, &c., cannot submit their disputes to arbitration. (Bac. Abr. Arbitrament, &c. (c).)

Personal representatives and other fiduciaries *are capable* of submitting controversies in their representative character to arbitration; but the *common law* holds them answerable, not only for a prudent selection of the arbitrators and a faithful presentation before them of the case, and of all accessible proofs and arguments, but also that the decision of the arbitrators *shall be absolutely correct*. (Bac. Arbitrament, &c., (c); 1 Lom. Ex'ors, 356; *Nelson v. Cornwell*, 11 Grat. 748.) Of course, therefore, such persons could never, in that state of the law, be advised to resort to arbitration. But, in Virginia, the objection has been removed by statute, which declares that any personal representative, or other fiduciary, may submit to arbitration any suit, &c., touching the estate, &c., in his charge; and when made in good faith the award shall be binding; but no such fiduciary shall be responsible

for any loss occasioned by an adverse award, unless it was caused by *his fault or neglect*. (V. C. 1873. c. 150 § 5.)

2°. The matter in Dispute which may be Submitted to Arbitration.

See Bac. Abr. Arbitrament, &c. (A);
W. C.

1^d. Personal Demands.

All *personal demands*, of whatsoever kind, may be submitted, whether arising *ex contractu* or *ex delicto*.

2^d. Disputes touching the *Title of Lands*.

Disputes touching the title of lands may be submitted; but the award of the arbitrator cannot, *per se*, transfer the title; at least if it be at common law an estate of *freehold*, which can only be conveyed by *livery of seisin*, or with us if it exceeds the term of *five years*; for the transfer of an estate exceeding five years can be effected in Virginia only by *deed or will*. (V. C. 1873, c. 112, § 1.) The award can do no more than *confer a right* which may be enforced upon the *basis of the award* by a court of equity, without reference to the original titles. (Bac. Abr. Arbitrament, (A).)

3^d. Prosecution for *Public Crimes*.

Accusations relating to crimes cannot be submitted to arbitration. (Bac. Abr. Arbitrament, (A).)

3°. The *Submission* to Arbitration.

The agreement to submit the dispute to arbitration is technically styled *the submission*;

W. C.

1^d. Mode of Submission; W. C.

1°. Mode of Submission at *Common Law*; W. C.

1^t. Submission by *Rule* (or *Order*) of Court where a *Suit is Pending*.

The agreement to submit in this case is by *order* (or *rule*) of court, and it is a part of the agreement that the award of the arbitrators shall be entered as a *judgment or decree of the court*.

2^t. Submission in *Pais*.

The submission in this case is by private agreement *in pais*, that is, in the country in contradistinction to an agreement *of record*. It may be either by parol or in writing, and if in writing, it may be either under seal or not under seal. But as a *matter of prudence* on the part of the arbitrator, as well as of the parties themselves, it ought to be always *in writing* at least. It is less important that it shall be *under seal*.

2°. Mode of Submission *under the Statute*.

In order to facilitate the submission of suits to arbitration which our Legislature, like that of England, has thought fit to regard as an eminently desirable mode of adjusting controversies, it is provided by statute (V. C. 1873, c. 150,

§ 1 & seq.) that persons desiring to end any controversy, whether there *be a suit pending therefor or not*, may submit the same to arbitration, and agree that *such submission may be entered of record* in any court, upon due *proof* to the court of such *agreement made out of court*, or by consent of parties given in court, *in person or by counsel*, it shall be *entered in the proceedings of such court*, and thereupon a *rule* shall be made that the parties shall *submit to the award* which shall be made in pursuance of such agreement.

By this statute the submission may be made a rule of court, *whether a suit is pending or not*, whereas, at common law, it can only be made a rule of court where a suit is *actually pending*. The manner of the submission will best be understood by the forms of the entries where the suit is *pending*, and where it is *not pending*.

FORM OF ENTRY WHERE SUIT IS PENDING.

C. C. Plaintiffs,
vs. In Debt [or whatever is the action, &c.],
 D. D. Defendant.

The parties in this cause, by their attorneys, mutually submit all matters in difference between them in this suit to the final determination of J. R. and S. C., and agree that their award, or the award of such person as they shall choose for an umpire thereupon, shall be made the judgment of the court. And the same is ordered accordingly. (Rob. Forms, 81; Sands' Forms, 322.)

FORM OF ENTRY WHERE SUIT IS NOT PENDING.

It being proved to the satisfaction of the court that C. C. and D. D. have mutually agreed to submit to the final determination of J. R. and S. C., or of the person whom they shall choose for their umpire, certain matters in difference between them, touching, &c. [*setting out briefly the subject of dispute*]; and have further agreed that the award of the said J. R. and S. C., or the award of such person as they shall choose for an umpire thereupon, shall be made the judgment of this court; the same is ordered accordingly. (1 Rob. Forms, 81; Sands' Forms, 322-'3.)

2^d. Revocation of Submission.

See Bac. Abr. Arbitrament, &c. (B);

W. C.

1^o. Revocation of *Common Law Submission*.

A common law submission by *rule of court* is not revocable without *leave of court*. To affect to revoke it without such leave would be a *contempt*, for which the party is liable *to be punished*; but it seems that in England, prior to Stat. 3 and 4 Wm. IV, c. 42, the revocation was valid,

leaving the offender to be punished for contempt, and also to an action on the agreement to refer. (Bac. Abr. Arbitram't, &c., (B); *Milno v. Gratrix*, 7 East. 608; *Skee v. Coxon*, 10 B. & Cr. (21 E. C. L.) 438; *Long v. Long*, 5 Call. 481.) But by the statute referred to above, in England, and by a corresponding provision with us, it is enacted that "no such submission, entered or agreed to be entered of record, in any court, *shall be revocable* by any party to such submission, *without the leave of such court*; and such court may, from time to time, *enlarge the term* within which an award is required to be made." (V. C. 1873, c. 150, § 2.)

A common law submission *in pais* is at once an *agreement* with the adversary (which it is admitted is not revocable), and a *power to the arbitrator*, which, in its own nature, is revocable, as all other powers, for the most part, are. Either party, at any moment before the award is pronounced, may disable the arbitrator to proceed by *revoking his authority*; but the party thereby *violates his agreement* to submit, and is liable accordingly to an action for its breach at the suit of the adverse party;—an action of *covenant*, if the agreement to submit were *under seal*; otherwise, an action of *trespass on the case in assumpsit*; in both of which such *damages* are demanded and recovered as in the opinion of a jury will compensate the adversary for the wrong done him.

The revocation is not complete until notice thereof is given *to the arbitrator*, so that if the award be pronounced before such notice is received, it is obligatory, and the notice is unavailing to divest the arbitrator's authority. But if the submission be *under seal*, it seems that the *revocation* must be also *under seal*, in order that it may be of *equal dignity with the authority*. (Bac. Abr. Arbitrament, &c., (B); *Vynior's Case*. & Co. 82 a, n. (A)., *Sed quære*;) W. C.

1st. Express Revocation of Submission.

Express revocation of the submission may be *verbal* or *in writing*, with the doubtful qualification just stated, where the submission is *under seal*, and with the further qualification already referred to, touching submission by *rule of court*.

2^d. Implied Revocation of Submission.

Any circumstances which would operate a revocation of any other authority *by implication* (as in the case of an agent or servant), will also by implication work revocation of the power of an arbitrator. Thus the power is revoked impliedly by the *death of the arbitrator*, or that of *either party*. So also by the *marriage of a feme party*, and by the *lunacy or bankruptcy* of either party, &c. (Bac.

Abr. Arbitrament, &c. (B); Insts. Com. & Stat. Law, 223 & seq.)

2°. Revocation of a *Statutory Submission*.

As the statutory submission is always made by *rule of court*, it cannot take place, as we have seen, without *leave of court*. (V. C. 1873, c. 150, § 2.) But it may perhaps be questioned whether this provision does not apply exclusively to *express revocations*, and not to those which are *implied*.

3°. Extent of Submission.

The *extent* of the submission depends of course upon its *terms*; and the terms, whether comprehensive or limited, must be in no case exceeded, either in respect to the *subject-matter* of the reference, or the *time allowed* for pronouncing the award. (Bac. Abr. Arbitrament, &c. (E).)

4°. Arbitrators and Umpire.

The friendly tribunal of *arbitration* may be constituted, at the pleasure of the parties, of *one or of several judges*. Usually it is made to consist of two or more persons, either mutually agreed on, or either party selecting one or more. And as, under the latter method, the number of arbitrators will be generally *even*, it is necessary to make provision for the very probable contingency of their being equally divided in opinion. In contemplation of that result an *umpire* (*impar* or impartial person,) is provided for, either by designating him in advance *by mutual consent*, or, what is more frequent, by a stipulation that he shall be chosen by the arbitrators.

W. C.

1°. Number of Arbitrators, and Mode of Designating them.

See Bac. Abr. Arbitrament, &c. (D).

2°. Conduct proper to be observed by Arbitrators and Umpire.

Their conduct should be characterized by patient inquiry, by calm judgment, by attention to the principles of law applicable to the case, by strict observance of justice between the parties, and by the most *entire impartiality*.

3°. Proceedings before the Arbitrators and Umpire.

The proceedings ought to be in accordance with the *principles of law*, unless the parties choose to waive them.

No illegal testimony ought to be admitted, nor any legal evidence excluded; and the proceedings should be so conducted as to occasion *no surprise* to either party, nor to put either at disadvantage.

5°. The Award.

The award is the judgment of the arbitrators, who, being "judges of the parties' own choosing," are *prima facie* presumed to have pronounced a decision unimpeachable by either litigant. (Bac. Abr. Arbitrament, &c. (E).)

W. C.

1°. Characteristics of Award.

The award must of course be *within the submission*, for the submission constitutes the sole authority of the arbitrators to determine between the parties at all; it must determine *all that was submitted*, leaving no part of the controversy undisposed of; it must not propose what is *impossible* or *illegal*; it must be *reasonable* and *advantageous*, (that is, not of something idle and of *no use to anybody*); it must be *mutual* (that is, what is awarded to be done, must be *an advantage to both*, so as to end the controversy, and discharge the one as well as give satisfaction to the other); it must be *certain and definite* (for if it does not determine the matter, it becomes the cause of a new controversy); and lastly, it must be *final*, disposing of the controversy wholly and finally. (Bac. Abr. Arbitrament, &c. (E) and (C), 1, 4, 3, 2, 5; 7 Rob. Pr. 492 & seq.)

2^d. Form of Award.

In *point of form* the award must conform to the terms prescribed in the submission, if any are prescribed. Thus, if by the submission the award is required to be *in writing*, it must be in writing accordingly; and if required to be under the *arbitrator's seal*, it must be sealed. On the other hand, if the submission contains no directions on the subject, the award may be *by parol*, or *in writing*, under seal or not, at the arbitrator's discretion, although it is obvious that for his own sake, as well as for the sake of the parties, it had better be *in writing*.

An award in pursuance of a *rule of court* must be *always in writing*, and must be returned to the court in order that it may be entered on the record of its proceedings. The entry is as follows:

C. C. Plaintiff,
vs. Upon a rule to make *award a judgment of the court*.
D. D. Defendant.

This day came the parties by their attorneys, [or, *this day came the plaintiff by his attorney, and the defendant being solemnly called, came not*]. And the arbitrators to whom the determination of the matters in difference between the parties was submitted by a rule of this court, the — day of — last past, this day returned their award in these words:

[*Insert the Award Verbatim.*]

Whereupon, on the motion of the said C. C., by his attorney, it is ordered that the said D. D. be summoned to the next term of this court, to show cause, if any he has or can show, why judgment should be not given on said award. (Sands' Forms, 323).

In cases at common law, where a *suit pending* is referred by *rule of court* to arbitrators, it is not *needful* to summon the adversary to show cause against the award, (that being a *requirement* of the statute only); but it doubtless might be done, if the party propounding the award were so minded. If both parties are present by counsel, when the award is returned, or even though both be not so present, it is the usual practice to enter judgment in pursuance of the award *immediately*. Thus, after reciting the award *verbatim* as above, instead of the last clause the entry runs thus:

"Whereupon, in confirmation of the same, on motion of the counsel for the said C. C. [or *D. D.*], it is considered by the court that the said," &c. (Rob. Forms, 82.)

3^d. Effect of award by way of Defence to a *Subsequent Suit*.

A *valid award extinguishes the original demand*, and is a bar to any action or suit upon it, upon the same principle, substantially, that a judgment or decree is, namely: that the parties having been once fully and fairly heard, further litigation as to the same matters should cease. (Bac. Abr. Arbitrament, (F) and (G); 7 Rob. Pr. 488 & seq; Lunsford v. Smith, 12 Grat. 559.)

But in order that an award may thus be a bar, there must be a *voluntary submission* by parties *competent*, and *authorized to make it*, in *no wise revoked*, either expressly or by implication, followed by a *lawful award*. (7 Rob. Pr. 490 & seq; Rogers v. Wood, 2 B. & Ad. (22 E. C. L.) 245.)

A question sometimes arises whether an agreement to stand in some particular to the determination of named persons, is to be regarded as a *submission* or not. Thus, in *Kidwell v. Balt. & O. R. R. Co.*, 11 Grat. 694, an agreement by a contractor, to abide by the estimates of the engineer, was considered to amount to a *submission*, and estimates of the engineer were deemed to be *conclusive*, unless they could be avoided on the ground of *fraud or mistake*. On the other hand, in *Iage v. Bossieux*, 15 Grat. 83, 99 & seq, where it was agreed that a builder should furnish the materials, and build a house in a workmanlike manner, the price to be fixed by *referees* agreed upon, it was held that the price fixed by such referees was not final, but that defects which afterwards became apparent by the shrinking of the timber, showing that the work was executed in a very defective and unworkmanlike manner, were ground for demanding compensation for such defects. So, in *Carroll County v. Collier*, 22 Grat. 310, it was held that a county was not concluded by the report of commissioners appointed by the county court, that a jail had been completed according to contract, not only because the commissioners were *not referees*, but merely agents of the court, but also because, if they were, the defects com-

plained of in the structure *had been disclosed* since the commissioners made their examination.

Another question connected with the effect of an award as a defence to a subsequent suit, is whether the parties may agree *in advance* to refer all disputes which *may arise* between them touching certain designated subjects to arbitrators, whose decision *shall be final*. As such an agreement tends to oust the courts of their jurisdiction, it is against the policy of the law, and voidable. (*Hill v. Hollister*, 1 Wils. 129; *Thompson v. Charnock*, 8 T. R. 139; 7 Rob. Pr. 485 & seq.) But this principle, though now settled, is doubtful in its origin, and not to be extended in its operation. And it is carefully to be distinguished from another principle with which it is sometimes confounded, and from which it is separated by a line not always easily discernible. That other principle is, that parties by their contract may lawfully make the decision of arbitrators, or of any third person, a *condition precedent to a right of action upon the contract*. In that case, such decision is a *part of the cause of action*; until the decision is made, and the cause of action thus becomes complete, the courts have no jurisdiction of the case, and, therefore, cannot be said to be *ousted* of their jurisdiction by the contract. This principle is commonly applied to contracts of *building and construction*, in which it is stipulated, that compensation for the work is not to be paid until the work has been accepted, and the amount of compensation ascertained by an architect, engineer, or other referee. (7 Rob. Pr. 485 & seq; 5 Do. 254-'5; *Kidwell v. Balt. & O. R. R. Co.*, 11 Grat. 676; *London v. Southside R. R. Co.*, 14 Grat. 314; *Scott v. Avery*, 8 W. H. & G. 499; 5 H. of Ld's Cases, 811.)

The mode of making the defence of *award* may be either by *special plea* averring the arbitrament and award (3 Chit. Pl. 927), or where the action is not founded on a sealed instrument, by the *general issue* of *nil debet* in debt, *non assumpsit*, in trespass on the case in assumpsit, and *not guilty* in trespass or trespass on the case *in tort*. (Bac. Abr. Arbitrament, &c., (G); 1 Chit Pl. 513; *Martin v. Thornton*, 4 Esp. 181). But this supposes, at least in the case of the plea of *non-assumpsit*, that the award was not upon a submission *made after action brought*, the plea of *non-assumpsit* referring to the *original ground* of action. (*Harrison v. Brock*, 1 Munf. 33; 7 Rob. Pr. 499; 5 Do. 251 & seq.)

The form of the *plea of award* is given, 3 Chit. Pl. 927; and the principles governing its structure may be seen, 7 Rob. Pr. 495 & seq; Chit. Cont. 760 & seq.)

4^a. Performance of award.

See Bac. Abr. Arbitram't, &c., (F);

W. C.

1°. What Performance is Sufficient.

The performance must be *substantial*, and according to the intent of the award, and not *merely illusory*—"keeping the word of promise to the ear, whilst it breaks it to the hope." The award is to receive a *liberal construction*, and hence, if a thing is awarded to be done, without saying *within what time*, the party shall have a *reasonable time*, because the arbitrators must intend all things necessary to the doing of the thing they award; and so the terms, "*heirs at law*," in an award respecting *personal estate* may be construed to mean, "all the testator's children living, and the children of any of them who died in his life-time." (Bac. Abr. Arbitrament, &c. (F); *Smith & als. v. Smith*, 4 Rand. 95.)

2°. Modes of *Enforcing Performance of Awards*; W. C.

1°. Modes of Enforcing Performance of Award in Case of *Submission, at Common Law*; W. C.

1°. Modes of Enforcing Performance, in case of *Submission at Common Law, by Rule of Court, where Suit is Pending*.

The award, it will be remembered, is agreed to be entered, and by the *rule of court* it is ordered that, when it is returned by the arbitrators, it shall be entered as a *judgment of the court*. Accordingly, when returned, it is so entered (*Ante*, p. 143); and being thus, to all intents, a *judgment of the court*, it may be enforced like *any other judgment*, by execution, adapted to the case, namely, an execution of *fiery facias*, when the award is to *pay money*, and by a *writ of possession*, &c., where the award is for the *delivery of property*, real or personal. It is believed that the award, in case of this sort of submission, may also be enforced by *attachment* and other process of contempt, the party's failure to comply with the award being deemed a *contempt of court*, whose judgment the award has been made. At least, in England, *attachment*, &c., is daily employed, in order to compel the observance of the award. (Bac. Abr. Arbitrament, &c. (H).) Nor is any reason perceived why the English practice should not prevail amongst us. But see 2 Tuck. Com. 40.

2°. Modes of Enforcing Performance of Awards, in case of *Submission at Common Law, by Agreement in Pais*; W. C.

1°. Modes of Enforcing Performance, in case of *Submission in Pais, where the Award directs Money to be Paid*; W. C.

1°. Action of Debt on the Award.

This action demands, specifically, the *very sum* awarded to be paid, *eo numero*. (1 Chit. Pl. 124; 4 Rob. Pr. 118 & seq; Bac. Abr. Arbitram't, &c., (G).)

2¹ Action on the Submission.

The submission must be either under seal or not under seal; and if under seal, it is either in the form of a bond, *with condition* to perform the award, or of a *general covenant*, binding the parties to the performance;

W. C.

1¹. Action of Debt on Bond with Condition to Perform Award.

See Bac. Abr. Arbitrament, &c. (G); 4 Rob. Pr. 118, &c.; Byars v. Thompson, 12 Leigh, 561.

In this action the plaintiff sues for the *penalty* of the bond, alleging the *breach of the condition* in the non performance of the award, and averring that he has *sustained damages* thereby to an amount designated. If he succeeds in proving a breach of the condition, the jury allow such damages as they think will compensate the plaintiff for the breach of the condition; and then the court is directed by statute, as we have seen, (*Ante* p. 25,) to render judgment *for the penalty*, to be discharged *by the damages* assessed by the jury. (V. C. 1873, c. 173, § 17; 4 Rob. Pr. 11 & seq; Byars v. Thompson, 12 Leigh 550; Kyd on Awards, 192 & seq.)

2². Action of Covenant.

In the action of *covenant*, which is appropriate wherever the submission is *under seal*, but not in the form of a *bond with condition*, the plaintiff alleges the making of the covenant, and the breach of it, whereby he avers he has sustained damage to a named amount; and if he proves the breach the jury assess the damages which, in their opinion, he has sustained thereby, for which damages the court gives him judgment. (Bac. Abr. Arbitrament, &c. (G); Chit. Pl. 131, &c.; 4 Rob. Pr. 11 & seq; Doolittle v. Malcolm, 8 Leigh, 608; Price v. Via, 8 Grat. 79.)

The *measure of damages*, as well in the next preceding head (1¹) as in this, is the sum of money which, by the award, the defendant was directed to pay, with interest.

3¹. Action of Trespass on the case in Assumpsit.

When the submission is *in pais*, and not *under seal*, the proper remedy thereon is by action of *trespass on the case in assumpsit*, in which damages are recovered as in the action of *covenant*, such as a jury shall estimate will be sufficient to compensate for the breach

of the contract of submission. However, in practice, the measure of damages in this action, as in *covenant*, is the sum of money awarded to be paid, with interest from the time appointed for the payment. (1 Chit. Pl. 114, 116-'17.)

It should be observed, that a breach of the contract of submission may arise, not only from a failure to comply with the award, but also from a *revocation of the arbitrator's authority*. The action in this case may be one or the other of those above-mentioned, according to the form of the submission, as above explained. (Kyd Awards, 19; 4 Rob. Pr. 12, 13; Vynior's Case, 8 Co. 81 b; March v. Balteel, 5 B. & Ald. (7 E. C. L.) 175.)

The damages in this instance are not regulated by any uniform rule, but depend on the circumstances of each case, to be estimated by the jury.

2^b. Mode of *Enforcing Performance* of Award in case of Submission *in Pais*, where the Award directs *property to be delivered* by one party to the other; W. C.

1ⁱ. When the Property to be Delivered is a *Personal Chattel*; W. C.

1^k. Action of *Detinue*.

The party to whom the award requires a chattel to be delivered, acquires thereby a *title to it*, which it is believed may be asserted by an action of *detinue*, just as where the award is for a *sum of money*, debt lies. At least such seems to be the deduction, not only from the analogy of the action of debt just adverted to, but also from the character and design of the action of *detinue*, as applicable to recover a *specific chattel*, wherever the property in that *particular chattel* is vested in the plaintiff. (1 Chit. Pl. 138-'9.)

Some doubt, however, is cast upon this conclusion by the case of *Hunter v. Rice*, 15 East. 100, in which Lord Ellenborough held that an action of *Trover* lay not for the value of a stack of hay awarded to be delivered by defendant to plaintiff, upon plaintiff's paying a named sum of money, which plaintiff tendered and defendant refused to accept. "I cannot conceive," says Lord Ellenborough in that case, "that the property was transferred by the *mere force of the award*," and "in the present case there is *no other remedy* for the plaintiff but to proceed against Sharpe, (the party defendant to the award) *upon the award*." See 1 Chit. Pl. 172.

2^k. Action on the *Submission*.

The action on the submission *in pais* may be (as in the case where the award is for the payment of

money), (1), An action of *debt* on the *arbitration-bond*, averring non-compliance with the award as a breach of the condition of the bond; (2), Action of *covenant* on the agreement to submit, where the same is *under seal*; (3), Action of *Trespass on the case in assumpsit* on the agreement to submit, where the same is *not under seal*.

In all these cases the plaintiff recovers such damages as in the judgment of the jury will compensate him for the non-observance of the award; and the most natural *measure* of damages is the value of the *chattel or chattels* awarded to be delivered.

2^d. When the Property to be delivered is *Real Estate*.

No action lies to *recover the real estate* in a *court of law*, for although the award may establish the *party's right to it*, it does not, by itself, confer a *legal title*; at all events, where the interest in the property is an *estate of inheritance, or for life, or for a term exceeding five years*; for in those cases our statute of conveyances (V. C. 1873, c. 112, § 1), enacts that the conveyance must be *by deed or will*. The only remedies, therefore, where real estate is awarded to be transferred by one party to another, (the submission being *in pais*,) and where the award is not duly complied with, are (1), By action on the submission; and (2), By bill in equity;

W. C.

1st. Action on the *Submission in pais*.

The action on the submission *in pais* may be as in the cases already presented: (1), Action of *debt* on the *arbitration bond*, to recover damages for the breach of the condition to submit to and perform the award; (2), Action of *covenant*, to recover damages for violation of the party's covenant *under seal*, to submit to and perform the award; (3), Action of trespass on the case *in assumpsit*, to recover damages for violation of the party's agreement *not under seal*, to submit to and perform the award. (*Ante*, p. 147, 1st, 2nd, 3rd, and p. 148, 2nd.)

2nd. Bill in Equity.

A court of equity, upon a bill filed by him to whom land is awarded to be conveyed, will decree the adversary to deliver and convey the land, according to the terms of the award; and that in consequence of the peculiar *prærium affectionis* attached to real property, which renders the remedy at law (through the medium of *damages*), *inadequate*. (*Kyd on Awards*, 220 & seq; 2 Stor. Eq. § 1458 a; Fry on Specific Perf. 510.)

The proposition, as thus broadly stated, may be, perhaps, not altogether free from doubt. It is admitted to be unqualifiedly true, that where the award is unexceptionable, and has been *acquiesced in by the parties*, if it is for the performance of *collateral acts*, such as a conveyance of lands, specific performance will be decreed, almost as if it were a matter of *contract*, instead of *award* (2 Stor. Eq. § 1458); but it seems to have been *formerly* at all events, the doctrine of the English courts, that a bill to carry an award into execution, where there is no *acquiescence in it* by the parties to the submission, would certainly not lie. But the remedy to enforce performance of the award must be taken at law. (Thomson v. Noel, 1 Atk. 62.) This, however, was an award touching *personalty*, and not lands. And the later cases in England appear to assume that the court of chancery will, in some cases at least, enforce an award for the conveyance of lands specifically, notwithstanding there may have been no subsequent acquiescence therein; and that is understood to be the American doctrine. (2 Stor. Eq. § 1458 a; Milnes v. Gery, 14 Ves. 400; Blundell v. Brettargh, 17 Ves. 234; Gourlay v. Duke of Somerset, 19 Ves. 430; Smallwood v. Mercer, 1 Wash. 295; Bac. Abr. Arbitrament, (I).)

It may be well to say here, that an *agreement to refer* to arbitration is never *specifically enforced* in equity. (Street v. Rigby, 6 Ves. 818; Price v. Williams, 3 Bro. C. C. 163; Gourlay v. Duke of Somerset, 19 Ves. 430-'31.)

3^b. Mode of Enforcing Performance of Award on Submission *in Pais*, where Award directs the doing of some *Collateral Thing*, other than the *Delivery of Property*; W. C.

1^a. Action on the *Submission*.

The actions are the same as in the several cases already mentioned. (*Ante*, p. 147, 1^k, 2^k, 3^k; 149, 1^k.)

2^a. Bill in Equity.

The bill in equity is believed to lie with us in order to enforce *specifically* the performance of an award to do any *collateral act, in specie*, where the remedy at law is *inadequate*; upon the same principle as that on which equity decrees the *specific performance* of contracts, and intervenes to prevent *irreparable injury* of any kind. (Bac. Abr. Arbitrament (I); 2 Stor. Eq. § 1458 & seq; *Ante* p. 149.)

2^d. Mode of Enforcing Performance of Award in case of
Statutory Submission.

It will be remembered that statutory submission is always by *rule of court*, whether a *suit be pending or not*. By the statute itself, the award is directed to be entered as a *judgment of the court*, unless cause to the contrary be shown at the *first term of the court after summons*. And when so entered, it is enforced like *any other judgment or decree*. (V. C. 1873, c. 150, § 3; Wheatley v. Martin's Adm'r, 6 Leigh, 62.)

The entry of the judgment is in the form following :

Entry of judgment in pursuance of rule of court.

C. C. Plaintiff,
vs. Upon rule of court to stand to award.
D. D. Defendant.

The said D. D. having been summoned to show cause, if any he has or can show, why judgment should not be entered in this cause, in pursuance of the award of J. R. and S. C., this day came the said C. C. by his attorney, and the said D. D. being solemnly called and not appearing; [or the said D. D. failing to show sufficient cause against the giving of judgment pursuant to the said award,] it is considered by the court, in pursuance of the said award, that, &c., (Rob. Forms, 81 & seq; Sands' Forms, 322-'3.)

5^d. For what causes an *Award may be set aside*.

See Bac. Abr. Arbitrament, &c., (K); 2 Tuck. Com. 40; Kyd on Awards, 336 & seq; W. C.

1^o. Improper Conduct of Arbitrators, &c.

When an award is put in suit *at law*, no extrinsic circumstances, nor any matter of fact outside of the award, can be given in evidence to impeach it. If it be open, therefore, to any objection of this kind, the defendant must apply for relief either to a court of equity by bill, or if the submission has been made a rule of any court of law, to the summary and equitable jurisdiction of that court of which the submission has been made a rule. (Bac Abr. Arbitrament, &c., (K); Head v. Muir, 3 Rand. 122.)

The ordinary principle is that, on a general reference involving questions of *law and fact*, the parties, by the submission, constitute the arbitrator judge of the law between them, and the award shall not be set aside on the ground of a mistake in the law, unless it appears *on the face of it*, that the arbitrator *intended to decide* according to law, and mistook it, in which case the award is not in effect his award, since he would not have made it, had he known

the law correctly. (Bac. Abr. Arbitram't, &c., (K); Shermer v. Beale, 1 Wash. 14; Id. 158; Pleasants v. Ross, 1 H. & M. 67.) The respect paid to the award upon an unmixed question of law, of a *professional arbitrator*, is especially great; nor can it be set aside unless an *illegality* appear *on the face of it*. (Bac. Abr. Arbitrament, (K); Morris v. Ross, 2 H. & M. 408; Ross v. Overton, 3 Call. 309). Reference as to a *disputed fact* merely, is not regarded as an *arbitration*, and the decision of the referee is *not conclusive*. (Bac. Abr. Arbitrament, &c., (K); Bassett v. Cunningham, 9 Grat. 684.)

Seeing, then, that awards can be set aside only for, (1), Improper conduct of the *arbitrators*; (2), Improper conduct of the *parties*, or one of them; and (3), *Illegality* or injustice apparent *on the face of the award* itself. (Shermer v. Beale, 1 Wash. 11; Pleasants & als v. Ross, 1 Wash. 156; Head v. Muir, &c., 3 Rand. 122); let us consider some of the acts and omissions which have been held to amount to *misconduct*.

Thus, where the arbitrator decides *on his own view*, without *calling the parties before him*; where he makes his award without *fully hearing* all the evidence which can be offered on both sides; where he *admits illegal evidence*, or excludes that which is *legal*; where he omits to allow a *reasonable time* to prepare for trial; where from his expressions or otherwise there is discovered a *bias or partiality* in the arbitrator's mind towards either party; where the arbitrator is ascertained to *have an interest* in the subject or question, unknown to either party when he was chosen; or where he is in any wise guilty of *partiality or corruption*, &c.; these will in general be grounds for setting aside the award. (Bac. Abr. Arbitrament, &c., (K); Kyd on Awards, 236-'7; McAllister v. McAllister, 1 Wash. 193; Ligon v. Ford, 5 Munf. 10; Graham's Adm'r v. Pence, 6 Rand. 529; May v. Yancy, 4 Leigh, 462; Lee v. Patillo, 4 Leigh, 436; Wheatley v. Martin's Adm'r, 6 Leigh, 62; McCormick v. Blackford, 4 Grat. 133; Pollard v. Lumpkin, 6 Grat. 398; Lunsford v. Smith, 12 Grat. 554; Moore v. Luckess, 23 Grat. 160; Jenkins v. Liston, 13 Grat. 535.)

2°. Improper Conduct of *Parties*.

No man can be permitted to derive an advantage from his own wrong, and therefore an award obtained *by fraud* or *by surprise* on the adversary is liable for such cause to be set aside.

3°. Objections to the Award itself.

Objections to the award *must appear on its face*, or else they *cannot be noticed*. Hence arbitrators are advised not to undertake to *assign reasons for their sentence*, nor to in-

corporate in the award the elements and materials on which it is grounded; for with plain men of undisciplined minds, it is observed that the conclusion is often right, whilst the reason assigned for it is absurd. (Bac. Abr. Arbitrament, (K); Taylor's Adm'r v. Nicholson, 1 H. & M. 67; Miller v. Kennedy, 3 Rand. 2; Wheatley v. Martin's Adm'r, 6 Leigh, 62; Cauthorn v. Courtney, 6 Grat. 381; Morris v. Morris, 9 Grat. 637; Pollard v. Lumpkin, 6 Grat. 398.)

6^d. Mode of Obtaining *Relief against an Erroneous Award.*

See Bac. Abr. Arbitrament, (K); Kyd on Awards, 226 & seq.
W. C.

1^o. Relief against Erroneous Award in case of *Submission in Pais.*

Relief against an erroneous award upon a *submission in pais*, is to be had *in equity alone*, and there *only upon the reasons* stated under the preceding head (5^d). (2 Stor. Eq. § 1452 & seq; Kyd on Awards, 227 & seq; Moore v. Luckess, 23 Grat. 161.)

2^o. Relief against Erroneous Award in case of *Submission by Rule of Court.*

The court, as whose judgment or decree the award is to be entered, may set aside the award for errors apparent *on its face*, or where it appears to have been procured by *corruption or other undue means*, or that there was *partiality or misbehavior* in the arbitrators or umpire, or any of them. (V. C. 1873, c. 150, § 3, 4.)

Independently of this statute, an award in pursuance of a submission by rule of court in a *pending suit* was subject to the supervision and control of the court, which could give as extensive relief in vacating the award as a *court of equity*. But the statute has restricted somewhat the jurisdiction of the common law courts in this particular. Thus, if an award be shown to be erroneous, not by anything *on its face*, strictly speaking, but by papers and exhibits *already in the cause*, which the arbitrators must have had before them, and by which they plainly designed to govern their award, a court of law would have no power, under the statute, (as independently of the statute it had,) to set the award aside; but in such case resort must be had to a court of equity, which will detect the error by inspecting the accompanying papers which disclose it, and will correct it. (Moore v. Luckess, 23 Grat. 165, 168.)

It should have been observed before, that an award may be good in part, and bad for the residue, and in such a case may be partially set aside, leaving the good part to stand, if thereby no principle of justice will be violated. (Moore

v. Luckess, 23 Grat. 171-'2; Aubert v. Maze, 2 Bos. & P. 371.)

An award entered as a *judgment or decree* of the court allows the same appellate proceedings thereupon as any other judgment or decree; but in order that such appellate proceedings may be had, it must be plainly and unequivocally entered as a *judgment or decree of court*. (Crane's Guard'n v. Crane, 21 Grat. 579.)

DIVISION II.

II. Redress of Injuries effected by the *mere Operation of Law*.

Redress of injuries by the mere operation of law is effected by, (1), Retainer; and (2), Remitter;
W. C.

CHAPTER I

1^a. Redress effected by *Retainer*.

The redress *by retainer* is allowed in no case other than that of the *executor or administrator* of a deceased person, who is also the creditor *of the deceased*. As he cannot *sue himself*, and there is no one else whom he can sue, the law, *by its own act*, puts him in as good a position *as if he had sued*, allowing him to retain out of the assets enough to *pay his own debt*, in preference to any creditor of *not superior dignity*. (3 Bl. Com. 18; 1 Lom. Ex. 646 & seq.)

This doctrine extends as far as the principle on which it is founded warrants and requires; that is, to all cases—at least, as a general rule,—where a personal representative, in order to obtain his debt from the decedent's estate, must *sue himself*, unless he were permitted to *retain*, in all which cases *the retainer* is allowed. Hence, he may retain for a debt due from the decedent to himself, *as trustee* for another; for, if a suit were brought, it could only be in his name. Hence also, if the creditor's wife be appointed the debtor's executrix, and qualifies, the husband may retain for his debt, for he is, *by law*, associated with her in the executorship, supposing it in Virginia, to have devolved upon the wife *after her marriage*, for otherwise, by statute with us, the woman's powers are determined by her marriage. (V. C. 1873, c. 126, § 9.) So, although the creditor have only a limited administration conferred upon him (*as durante absentia*, or *durante minoritate*, &c.) he still enjoys this privilege of *retainer* as a concomitant of his incapacity to sue.

The common law prescribes that a decedent's debts shall be paid in a certain classified order, (2 Bl. Com. 511.) In Virginia also they are arranged in a certain order of priority, but an

order differing considerably from that of the common law. Thus, the statute provides (V. C. 1873, c. 126, § 25), that the assets of a decedent, *after the payment of funeral expenses, and charges of administration*, shall be applied,

(1), To debts due to the United States.

(2), Taxes and levies assessed upon the decedent previous to his death.

(3), Debts due from him as personal representative, trustee for persons under disabilities, guardian or committee, where the *qualification was in Virginia*, including husband acting as such fiduciary, in right of his wife.

(4), All other demands, *ratably*, except

(5), Voluntary *obligations*.

The common law makes no discrimination in the privilege of *retainer*, in respect to the several classes of debts; but with us the doctrine is not applicable to the *first-class*, because there is but a *single creditor* concerned (viz: the United States), and is *expressly* qualified as to the *fourth class* (constituting the great body of the indebtedness of most decedents), which are required *to be paid ratably*. (V. C. 1873, c. 126, § 25.)

CHAPTER II.

2^a. Redress effected by *Remitter*.

The doctrine of *remitter*, like that of *retainer*, is founded upon the fact that the circumstances are such that *any action* to afford redress to the party injured must be brought *by himself against himself*; to avoid which legal absurdity the law, *by its own operation*, gives the party the same benefit which an action, had it been possible to bring one, would have afforded. *Remitter* applies to the title to real estate, and to that alone. Thus, where one is in possession by a wrongful title, as by a disseisin, and the true property in the *freehold* of the lands is cast upon him by *act of the law*, as *by descent*; or at least is required without his *immediate participation*, he is *remitted* to his *true and better title*. For being himself in possession of the *freehold*, whatever better title exists must be asserted *against him*, which cannot be done *by action*, for he is himself the owner of that better title, and he *cannot sue himself*. The law, therefore, *by its own act*, remits him to his superior title, and holds him to be in possession, in pursuance, not of his wrongful title, but of that better and surer estate. (3 Bl. Com. 19.)

Littleton's exposition of the doctrine of *remitter* is as follows:

"*Remitter* is an ancient term in the law, and is where a man hath two titles to lands or tenements, viz: one a more ancient

title, and another a more latter title; and if he come to the land by a latter title, yet the law will adjudge him in by force of the elder title, because the elder title is the more sure and more worthy title. And then, when a man is adjudged in by force of his elder title, this is said to be a *remitter* in him, for that the law doth admit him to be in the land by the elder and surer title.

"As if tenant in tail discontinue the tail, and after he dis-
seiseth his *discontinuee*, and so dieth seised, whereby the tene-
ments descend to his issue or cousin inheritable by force of the
tail; in this case, this is to him to whom the tenements descend,
who hath right by force of the tail, a *remitter* to the tail, be-
cause the law shall put and adjudge him to be in by force
of the tail, which is his elder title; for if he should be in by
force of the *descent*, then the *discontinuee* might have a writ of
entry *sur disseisin* in the *per* against him, and should recover
the tenements and his damages. But inasmuch as he is in his
remitter by force of the tail, the title and interest of the discon-
tinuee is quite taken away and defeated," &c. (3 Th. Co. Lit.
154 & seq. and n (A).)

It will be observed, that it is necessary for the application of
the doctrine of *remitter*, that the elder and better estate should
come to the party by *act of the law*, as by *descent*, or at least
without his *immediate participation*.

DIVISION III.

III. Redress of injuries effected by the *concurring act of the parties*, and of the law; that is, by *suit in court*.

It is proposed under this head to set forth, (1), The subject of *courts*, including their nature, classes, and cognizance; and (2), The various *remedies for wrongs by suit*, especially in the courts of common law and equity;

W. C.

CHAPTER I.

1^a. Courts.

In studying the subject of *courts* let us note, (1), *The nature and incidents* of courts, including attorneys at law, &c.; (2), *The various classes of courts*, as well in England as in Virginia, and (3), *The wrongs cognizable* in the several classes of courts in England, and in Virginia;

W. C.

SECTION i.

1^b. Nature and Incidents of Courts in general, including Attornies at Law, &c.

Let us take notice of, (1), The *definition* of a court; (2), The *distinction of courts*, as *courts of record* and *courts not of record*; (3), The constituent parts of a court; and (4), Attornies, &c.; and *advocates or counsel*:

W. C.

1°. Definition of a Court.

A court is defined to be a *place where justice is judicially administered*. Whether in a palace or a cabin, in a blacksmith shop or a tavern porch, under a tree, like Abraham's oak at Mamre, or in the open field, is immaterial, (3 Bl. Com. 23; 3 Th. Com. Lit, 322). And in connection with the definition, Lord Coke treats us to one of his inimitable and happily *unimitated* etymologies, enunciating it with no less confidence than he would have propounded a legal proposition from his place as Chief-Justice of England: "*Curia* court," says he, "is a place where justice is judicially ministered, and is derived a *cura quia in curiis publicis curas gerebant*!"

2°. Distinction of Courts.

Blackstone treats the *judicial power* of England as a mere *department of the executive functions*, regarding the king as the *fountain of justice*, and all courts as derived from the *power of the crown*; the king being supposed in contemplation of law to be always present in them; although, as that is in fact impossible, he is there represented by his judges, whose power, he says, is *only an emanation of the royal prerogative*. (3 Bl. Com. 24.)

It cannot be denied that this was the original theory of the English constitution; but even when Blackstone wrote his commentaries, rather more than one hundred years ago, it had ceased to be the view practically taken of the administration of justice in England; and provision had been made for the *independence* of the three principal courts of the realm, namely: the courts of king's bench, common pleas, and exchequer; a wise policy originated by the sagacious men who guided the counsels of William of Orange, (Stat 13 Wm. III, c. 2, A. D. 1701); and consummated in the first year of the reign of that good man and well-meaning king, Geo. III, (Stat. 1 Geo. III, c. 23, A. D. 1760). And the President Montesquieu, in his "*Spirit of Laws*," where he derives his general maxims from the constitution of England as his model, does not hesitate to declare his conviction that the permanent and secure separation of the three great departments of political power—legislative, executive and judicial—is *indispensable to the liberty of the subject*. His words are—

"When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise lest the

same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.

"Again, there is no liberty if the power of judging be not separated from the legislative and executive powers. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor.

"There would be an *end of everything*, were the same man, or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and that of judging the crimes, or differences of individuals." (Montesq. Sp. Laws, B, xi. c. 6.)

The framers of our American constitutions having thoroughly imbibed these notions of Montesquieu, have taken care generally, if not universally, to engraft them into the organic law of these States, severally and conjunctively. Thus, the third article of the Constitution of Virginia, of June 29, 1776, (as the second article of the Constitution of 1869 also does substantially), declares that "the legislative, executive, and judiciary departments shall be *separate and distinct*, so that neither exercise the powers properly belonging to the other; nor shall any person exercise the powers of more than one of them at the same time, except that the justices of the county courts shall be eligible to either house of assembly." And the Federal Constitution, although it does not make a similar *declaration*, yet organizes the several departments separately, and provides, by the structure of the government, that they shall be, for the most part, independent the one of the other. (U. S. Const. Art. I, II, III; 1 Stor. Const. § 520 & seq; Cooley's Const. Lim'ns, 34-'5; 85 & seq.; 87 & seq.; 94.)

For the more speedy, universal, and impartial administration of justice between subject and subject, the law appoints a variety of courts, some State and some Federal, some with a more limited, others with a more extensive jurisdiction; some constituted to *enquire* only, others to hear and determine (*oyer et terminer*); some to determine in the first instance, others upon appeal, and by way of review. All these in turn will be noticed in their respective places; and here, therefore, it will be needful to mention only *one distinction* which runs through them all, viz: that some of them are *courts of record*, others *not of record*. (3 Bl. Com. 24; Bac. Abr. Courts, (D).)

W. C.

1^d. Courts of Record.

A court of *record* is a court of whose proceedings a solemn contemporaneous minute is kept by an officer appointed and sworn for the purpose, who in England is often denominated *prothonotary* (equivalent to *chief-clerk*) and with us, simply *clerk*. The records thus kept are of such high and super-eminent authority, that their truth is not to be called in question. For it is a settled maxim that nothing shall be averred against a record, at least by the parties thereto, nor shall any plea, nor even proof, be admitted to the contrary, with some qualifications. And if the existence of a record be denied, it shall be tried by nothing *but itself*; that is, upon a bare inspection, whether there be any such record or no; else there would be *no end of disputes*. But if there be *any fraud* in making up the record, that may be freely inquired into, and the record, as far as it is thus fraudulent, *will be avoided*. (*Harkins v. Forsyth & als*, 11 Leigh, 305-'6; *Wood's Case*, 4 Rand. 329; *Carper v. McDowell*, 5 Grat. 212; 2 Bl. Com. 465, n (36); *Hynder's Case*, 4 Co. 17 a & b.)

A court of *record* may, by the common law, *summarily* punish, as for a contempt, not only misbehavior in the *presence of the court*, but many other acts besides, indirectly, as well as directly, tending to obstruct the administration of justice; but courts *not of record* can punish only threats, violence, &c., in the *presence of the court*. In the latter case all other *contempts* must be proceeded against *by indictment*, &c. (*Synops. Crim. Law*, 143-'4; *Id.* 212 to 214; *Bac. Abr. Courts*, (E).)

When several judges compose a court, and they are equally divided on questions discussed before them, the general rule is that the decision is to be recorded *in the negative*. Thus, if it happen on a demurrer, the demurrer is *overruled*; if on the admission of testimony, the testimony is *excluded*, supposing the motion to be *to admit it*; if on motion for a *new trial*, the motion is *overruled*; if on motion to arrest the judgment, the judgment is *entered in pursuance of the verdict*; and if on an appeal or writ of error, the judgment or decree is *affirmed*. (*United States v. Daniel*, 6 Wheat. 542; *United States v. Worrell*, 2 Dal. 388; *The Antelope*, 10 Wheat. 66; *Etting v. Bank of United States*, 11 Wheat. 59.)

2^d. Courts *not of Record*.

A court *not of record* is a court of whose proceedings no solemn contemporaneous minute is kept by a sworn officer. It is not necessarily the court of a *private person*, as Blackstone intimates, for in his own subsequent enumeration it appears that amongst courts of this class are found some of the most important in England, such as the court of chan-

cery (in respect to its extraordinary equity jurisdiction), the ecclesiastical courts, and the admiralty and maritime courts, which for several centuries have dispatched more than half of the law business of the realm.

With us the courts *not of record* are few, and exercise very subordinate, although still necessary functions, being in our Virginia system only the courts of *justices of the peace*, and perhaps we might add, of the *coroner*; and in the system of the United States, only the courts of *United States commissioners*, who occupy a position analogous to that of justice of the peace in the State.

No record being kept of the proceedings of these courts, what passes there is to be proved as best it may, by witnesses or informal *memoranda*, if any such were made, as it is prudent and right, although not indispensable, should be done.

3°. Constituent Parts of a Court.

In every court there must be at least three constituent parts, the *actor*, *reus*, and *judez*; the *actor*, or plaintiff, who complains of any injury done; the *reus*, or defendant, who is called upon to make satisfaction for it; and the *judez*, or judicial power, which is to examine the truth of the fact, to determine the law arising upon that fact, and if any injury appears to have been done, to ascertain and apply the remedy. It is usual also in the superior courts, and in some instances in the inferior courts likewise, to have attornies, and advocates or counsel, as assistants. (3 Bl. Com. 25.)

4°. Attornies and other inferior Law-Agents, and Advocates or Counsel.

As suitors are not in general competent to manage their own causes, in most civilized countries a class of professional persons are employed, who, being duly instructed and disciplined, can render effectual aid, not to the parties only, but to the court as well, in the administration of justice. These persons are variously designated. They are sometimes styled *attornies*, because they stand in the *tourn* or place of the client; *proctors* (*procuratores*), because they are supposed to *exercise care* in respect to the client's business *for him* or in his stead; *solicitors*, because it was their function originally *to solicit* the favor and grace of the *court of equity* in the client's behalf; and sometimes *advocates* or *counsellors*, because their peculiar province is to give *advice* or *counsel* to the client touching his legal interests, and to *advocate* his cause in the courts;

W. C.

1^d. English System touching Attornies and other inferior Law-Agents, and Advocates or Counsel; W. C.

1°. Attornies or other inferior Law-Agents in England.

Originally (according to the old Gothic constitution), every suitor was obliged to appear in person, to prosecute

or defend his suit, unless by special license under the king's letters patent. An infant, a married woman, or an idiot, cannot, to this day, in point of *form*, appear by attorney; the infant and idiot, for *want of discretion* to select and appoint a proper substitute; and the married woman, because in law her existence is *merged in her husband's*, and her will is controlled by his. So that even where an attorney is in fact employed in the behalf of such parties, the record should describe them as appearing in proper person, or by guardian or next friend (*prochein ami*), according to the nature of the case. But as in the Roman law, "*cum olim in usu fuisset, alterius nomine agi non posse, sed quia hoc non minuiam incommoditatem habebat, ceperunt homines per procuratores litigare*," (Justin. Inst. 4, Tit. 10), so in England, upon the same principle of convenience, it was permitted in general by divers ancient statutes, whereof the first is Westm. II (13 Edw. I, c. 10), that attorneys may be made to prosecute or defend any action, as representing the parties thereto. These attornies have long ago been formed into a regular corps; they are admitted to the execution of their office by the superior courts, and are in all points *officers* of the courts to which they are admitted; and as they have many privileges on account of their attendance there, so they are peculiarly subject to the animadversion of the judges. (3 Bl. Com. 25-'6; 3 Steph. Com. 384-'5; Bac. Abr. Attorney; Leigh's Case, 1 Muuf. 468; *ex-parte* Garland, 4 Wal. 878; *ex-parte* Robinson, 19 Wal. 512.)

The duties of an *attorney* concern the institution of suits, and the conduct of them *out of court* (in the *actual hearing in court*, they are conducted by *advocates* or *counsel*); the preparation of causes for trial, and the general management of law-business *in pais*. Persons who discharge similar functions in the *courts of chancery* are denominated *solicitors*; and those whose business of like character lies in the *ecclesiastical courts*, and *courts of admiralty*, are styled *proctors*. (Bac. Abr. Attorney.)

2°. Advocates or Counsel in England.

Of *advocates* or *counsel* in England, there are in the courts of common law and equity two species or degrees, namely, *barristers* and *sergeants*;

W. C.

1°. Barristers,—*Apprenticii ad legem*.

Barristers (the lowest degree of advocates or counsel), are admitted to practice only after a considerable period of study, or at least of *standing*, in the *Inns of court* (the ancient juridical University of England; 1 Bl. Com. 23, &c.); and in the old books are styled apprentices (*apprenticii ad legem*), being looked upon as merely *learners*,

and not qualified to execute the full office of an advocate, until they were of *sixteen years'* standing, at which time, according to Fortescue, they might be called by the authorities of the juridical University above described, to the state and degree of *sergeants*, or *servientes ad legem*. (3 Bl. Com. 26-'7; 3 Steph. Com. 385-'6; Fortesc. de Leg. c. 50.)

2^d. Sergeants at Law, *Servientes ad legem*.

This is the highest degree of advocates or counsel known in England. Their latin designation is *servientes ad legem*, and they alone are permitted to practice in the court of *common pleas*. (3 Bl. Com. 27 & seq; 3 Steph. Com. 386 & seq; Fortesc. de Leg. c. 50.)

In general, barristers and sergeants indiscriminately (except in the *court of common pleas*), may take upon them the protection and defence of suitors, whether plaintiffs or defendants, who are, therefore, called their *clients*, like the defendants of the ancient Roman orators. Those indeed practised *gratis*, for honor merely, or at most, for the sake of gaining influence; and so likewise in England, it has been long established that a counsel can *maintain no action for his fees*, which are given, not as *locatio vel conductio*, but as *quiddam honorarium*; not as salary or hire, but as a mere gratuity; as is also laid down with regard to advocates in the civil law, whose *honorarium* was directed by a decree of the senate not to exceed, in any case, 10,000 sesterces, or about \$400 of our money. (3 Bl. Com. 28; 3 Steph. Com. 387-'8.)

And in order to encourage due freedom of speech in the lawful defence of their clients, and at the same time to give a check to the unseemly licentiousness of prostitute and illiberal men (a few of whom may sometimes insinuate themselves even into the most honorable professions), it has been holden that a counsel is not answerable for any matter by him spoken relative to the cause in hand, and suggested in his client's instructions; although it should reflect upon the reputation of another, and even prove absolutely groundless; but if he mentions an untruth of his own invention, or even upon instructions, if it be *impertinent to the cause* in hand, he is then liable to an action at the suit of the party injured.

And counsel guilty of deceit or collusion are punishable by the Stat. Westm. I, (3 Edw. I, c. 28), with imprisonment for a year and a day, and perpetual silence in the courts, a punishment still sometimes inflicted for gross misdemeanors in practice. (3 Bl. Com. 29.)

This subject may be closed with a remark applicable to both attornies and counsel, viz: that they possess the ex-

clusive privilege of transacting business in the courts of justice in matters in which they are not personally concerned. For no man can conduct the practical proceedings in a cause to which he is not himself a party, except he be an *attorney*; nor be allowed to address the court in such a cause, unless he be either *attorney or counsel*. In the superior courts, indeed, the latter province belongs to *counsel alone*, exclusively even of the *attornies*. (3 Steph. Com. 389.)

2^d. The Virginia System touching Attornies, &c., and Advocates or Counsel.

In Virginia, such a division of labor as has been set forth as existing in England has not as yet been found needful in the State courts, and is only imperfectly recognized in the United States courts, so far as it may exist in the State where the court sits, or where the practitioner is qualified, (1 Abb. U. S. Prac. 270; Id 125.) All the functions of attorney, solicitor, proctor, and advocate or counsel are with us united in the same person, who is styled indifferently, attorney at law, counsel and lawyer, although the proper legal designation, at least in our State courts, appears to be *attorney at law*. (2 Tuck. Com. 46; V. C. 1873, c. 160, § 3.)

In the *district courts* of the United States, whose jurisdiction embraces cases at common law, in equity and in admiralty, the practitioners are technically styled attornies, solicitors, proctors, advocates and counsel; in the *circuit courts* whose original cognizance extends only to cases at common law and in equity, the practitioners are formally known as attornies, solicitors and counsel, and in the *supreme court*, the formal designation is attornies and counsel. But the distinction seems to be of no practical importance. (1 Abb. U. S. Prac. 270, 125.)

It will be expedient to consider our Virginia system under the heads following, namely: (1), The history of the law touching attornies, and their compensation in Virginia; (2), The mode of obtaining license to practice law in Virginia; (3), The mode of superseding attorney's license for mal-practice, &c; and (4), The nature and extent of an attorney's privileges and liability;

W. C.

1^o. The History of the Law touching Attornies, and their Compensation in Virginia.

Our colonial ancestors seem to have cherished bitter prejudices against professional lawyers, the reasons of which, if indeed any existed, it is vain at this distance of time to explore. It may have been only the unrestrained exhibition of that sentiment of jealous dislike which is pretty sure to animate an aristocracy of birth and fortune, in respect to

the opposing aristocracy of capacity and learning; a jealousy and dislike which has many times flamed out in England against the new barons and earls who, by eminence in, the legal profession, have been raised to the peerage.

A conspicuous instance of such hostility very insolently and very imprudently manifested, and signally chastised, is presented in a passage of Lord Thurlow's life, which reflects great credit upon that distinguished, but by no means impeccable man, and which, as affording what Mr. Charles Butler, in his most interesting "*reminiscences*," styles a "*superlatively great*" display of eloquence, (an eloquence inspired by a vigorous and manly character,) is worth transcribing at large.

"*At times*," says Mr. Butler, "Lord Thurlow was superlatively great. It was the good fortune of the reminiscient to hear his celebrated reply to the Duke of Grafton," (a descendant of one of Charles II's bastards) "during the inquiry into Lord Sandwich's administration of Greenwich hospital," (in 1779). "His grace's action and delivery, when he addressed the house, were singularly dignified and graceful; but his matter was not equal to his manner. He reproached Lord Thurlow with his plebeian extraction, and his recent admission into the peerage. Particular circumstances caused Lord Thurlow's reply to make a deep impression on the reminiscient. His lordship had spoken too often," (or as Lord Campbell suggests, and is more probable, had given umbrage by his dictatorial tone) "and began to be heard with a civil, but visible impatience. Under these circumstances, he was attacked in the manner we have mentioned. He rose from the wool-sack, and advanced slowly to the place from which the chancellor generally addresses the house; then fixing on the duke the look of Jove when he has grasped the thunder: 'I am amazed,' he said, in a level tone of voice, 'at the attack which the noble Duke has made on me. Yes, my lords,' considerably raising his voice; 'I am amazed at his grace's speech. The noble duke cannot look before him, behind him, or on either side of him, without seeing some noble peer who owes his seat in this house to his successful exertions in the profession to which I belong. Does he not feel that it is as honorable to owe it to these, as to being *the accident of an accident*? To all these noble lords the language of the noble duke is as applicable and as insulting as it is to myself. But I don't fear to meet it single and alone. No one venerates the peerage more than I do; but, my lords, I must say, that the peerage solicited me, not I the peerage. Nay, more, I can say, and will say, that as a peer of parliament, as

speaker of this right honorable house, as keeper of the great seal, as guardian of his majesty's conscience, as lord high chancellor of England, nay, even in that character alone in which the noble duke would think it an affront to be considered, but which character none can deny to *me*, as a MAN, I am at this moment as respectable—I beg leave to add, I am at this moment as much respected—as the proudest peer, I now look down upon!”

“The effect of this speech,” Mr. Butler proceeds to say, “both within the walls of parliament and without them, was prodigious. It gave Lord Thurlow an ascendancy in the house which no chancellor had ever possessed; it invested him, in public opinion, with a character of independence and honor; and this, although he was ever on the unpopular side of politics, made him always popular with the people.” (Butl. Reminisc. 163, &c., 5 Campb. Chan’rs, 409.)

Whatever may have been the reason, the landed gentry of the colony of Virginia waged against the lawyers, through the “Grand Assembly,” a relentless war for more than a century, of which, indeed, some practical vestiges survived until a very recent period.

The earliest manifestation of suspicious aversion occurs in 1642, when an act was passed, “For the better regulating attorneys, and the *great fees exacted by them*,” by which it was declared that it should be,—

“Not lawful to plead for another without *license from the court where he pleadeth*, and can have license only in the *quarter-court* (held by the Governor and Council at the seat of government,) and *one county court*.”

The same act also prescribes what fees should be taken; and very starveling fees they were, viz: in the county court, where the great bulk of the business was transacted, *twenty pounds* of tobacco, and in the *quarter-court* (the *supreme court* of the colony), *fifty pounds*. The act concludes with a provision (with such fees not superfluous), that—

“No attorney shall refuse to be *entertayned*” in any cause, “provided he be not *entertayned* by the opposite party,” upon pain of heavy fines. (1 Hen. Stats. 275.)

In November, 1645, we find the following statute, symptomatic of chronic irritation:

“Whereas, many troublesome suits are multiplied by the unskilfulness and covetousness of attorneys, who have more intended their own profit, and their inordinate lucre, than the good of their clients; Be it therefore enacted, that all *mercenary* attorneys be wholly expelled from such office,” except as to suits pending. (1 Hen. Stats. 302.)

This peremptory prohibition of "*mercenary attorneys*," seems to have wrought some confusion in the administration of justice; for just two years afterwards, in November, 1647, (22 Car. I.) we find the following surly recognition of the mischief, and vain attempt to obviate it:

"It is thought *fitt* that unto the act forbidding mercenary attorneys, it *bes* added that they shall not take any *recompence*, either directly or indirectly. And that it be further enacted, That in case either plaintiff or defendant, by his *weakness*, shall be likely to *loose* his cause, that they themselves may either open the cause in such case of weakness, or shall appoint some *fitt* man out of the people to plead the cause, and allow him satisfaction requisite, and not to allow any other attorneys in private causes, *betwixt* man and man, in the country." (1 Hen. Stats. 349.)

The unsatisfactory results of this policy afforded the lawyers a complete but a very short triumph. By Act of December, 1656, (7 Commonwealth, or 3 Cromwell,) it was enacted thus:

"This Assembly, finding many inconveniences in the act prohibiting mercenary attorneys, *doe therefore hereby enact*, that that act, and all other acts against mercenary attorneys, to be totally repealed, provided *all waies* that those only be called counsellors at law who have been *all readie* qualified thereunto by the *lawes* of England, and those so qualified to enjoy all *privileges* those laws give them." (1 Hen. Stats. 419.)

The ascendancy of common sense which dictated this act was short-lived indeed. "'Twas a meteor gleamed." In March, 1658, some proposition seems to have been stated by the House of Burgesses, (the popular branch of the colonial legislature,) concerning lawyers, which drew from the Governor, Sir William Claiborne, this animadversion:

"The answer of the *goveronour* and council to the house's message about the lawyers: The *governour* and council will consent to this proposition, so *farr* as it shall be agreeable to *magna charta*."

23 *Martii*, 1657.

WM. CLAIBORNE.

Two days afterwards in the house:

"March 25, 1658, *Proposed* whether the committee shall draw up a reply to the answer of the *governour* and council of the 23rd instant, concerning the proposition about lawyers:

"*Resolved*, An answer should be drawn up by the committee."

The answer was as follows:

"The humble reply of the Burgesses to the *governour* and council.

"To the first, *wee* have considered *magna charta*, and *wee* cannot discern any prohibition contained therein, but that these propositions may pass into lawes."

Accordingly, the next day the following proceedings are recorded:

"March 26, 1658: *Proposed*, whether a *regulation* or *total ejection of lawyers*?"

"*Resolved*, By the first vote,—*An ejection!*"

And thereupon was enacted a statute which is a marvel, as well for bad temper as for its stupid policy:

"March, 1658, (9 Commonwealth.)

"Whereas, There doth much charge and trouble arise by the admittance of attorneys and lawyers, through pleading of causes, thereby to maintaine suites in lawe to the great prejudice and charge of the inhabitants of this *collony*; for prevention thereof, be it enacted by the authoritie of this present grand assembly, that *noe person or persons whatsoever*, within this *collony*, either *lawyers or any other*, shall pleade in any courte of judicature within this *collony*, or give counsell in any cause, or controvercie whatsoever, *for any kind of reward or profit whatsoever*, either directly or indirectly, upon the penalty of *five thousand pounds* of tobacco upon every breach thereof. And because the breakers thereof, through their subtillity, cannot easily be discerned, *Bee it, therefore, enacted*, that every one pleading as an attorney to any other person or persons, if either plt. or defendant desire it, shall make oath that he neither directly nor indirectly is a breaker of the act aforesaid." (1 Hen. Stats. 495, 482.)

In June, 1680, (32 Car. II), the struggling fraternity, which certainly exhibited wonderful tenacity of life, again for a brief space got their heads above water, as appears by the following law:

"Whereas, All courts in this country are many *tymes* *hindred*, and troubled in their judiciall proceedings by the impertinent discourses of many busy and ignorant men, who will pretend to assist their *freind* in his busines; and to cleare the matter more plainly to the court, although never desired nor requested there unto by the person whome they pretended to assist, and many *tymes* to the destruction of his cause, and to the great hindrance and trouble of the courtes," therefore lawyers shall be *licensed* by the "governour." (2 Hen. Stats. 478.)

In 1682, however, (34 Car. II), they were gotten under again:

"Nov. 1682: Forasmuch" as this last Act of 1680 "*is found inconvenient*," it is repealed. (2 Hen. Stats. 498.)

For thirty-six years after this apparent *extinction* of the

profession, no legislation appears to have occurred upon the subject. The craft, however, seems to have lived and flourished; the necessities of society proving more than a match for the stolidity of the "grand assembly," so that that body, abandoning at length the vain design of suppressing it, betook itself to the not less futile attempt to *regulate the charges* of the profession. Thus, in April, 1718, (4 Geo. I), the attorney's fee in the *general court* (formerly the *quarter court* held by the governor and council) was fixed at *fifty shillings*, or five hundred pounds of tobacco; and in the county court at *fifteen shillings*, or one hundred and fifty pounds of tobacco. (4 Hen. Stats. 59.)

Thenceforward no further illiberality was manifested towards the legal profession, save the persistence in the policy, (always frustrated), of attempting to regulate and limit the fees of counsel, which was not abandoned until the revisal of 1849.

It is believed that *no license* upon examination was required for the practice of the law, until May, 1732, (6 Geo. II), when an act was passed reciting that the number of unskilful attornies in the *county courts* had become a great grievance, and providing that none should practise in those courts unless licensed by the governor and council, who are directed to cause applicants to be examined by persons learned in the law. (4 Hen. Stat. 360.) This act by its terms did not extend to attornies practising in the *general court*, nor to any counsellor or barrister at law whatsoever; and at first appears to have been objected to, for it was repealed in 1742, (5 Hen. Stats. 171); but it was revived again in 1745, "the great number of ignorant and unskilful attornies" having become a great grievance, (5 Hen. Stats. 345). And this precaution of licensing those persons only to practise who are found worthy in *character and learning* has been maintained to this day, *in theory*, although unfortunately, it is very loosely applied in practice.

2°. Mode in Virginia, of *Obtaining License to practise Law.*

In order to practise law in the *State courts* of Virginia, as attorney or counsel, one must procure from the court of the county or corporation where *he has resided*, (*i. e.* has had his *domicil*). (Stor. Confl. Laws, § 41, 44, &c.), for *one year next preceding*, a certificate that he is a person of *honest demeanor*, and is *over twenty-one years of age*; and upon producing such certificate to them, any two judges of the *supreme court of appeals*, or of the *circuit courts of Virginia*, may grant a license *in writing*, to practise law in the courts of the State, if upon examination, they find him *duly qualified*. (V. C. 1873, c. 160, § 1; Acts, 1873-'4,

p. 249, c. 215.) One may also practise who has been *duly licensed*, and is *practising*, as counsel or attorney at law, in any State *adjoining Virginia*, or in the District of Columbia. (V. C. 1873, c. 160, § 2.)

But besides being thus provided with a *license*, the party must produce before each court in which he intends to practise, satisfactory evidence of his being so licensed, and take an oath that he will honestly demean himself in the practice of the law, and to the best of his ability execute his office of attorney at law, and also, when he is licensed in this State, must take the oath of fidelity to the Commonwealth; and for practising without such license or without taking the oath prescribed, he is liable to forfeit \$150 in each case. But this does not prevent his *instituting suits* in the *superior courts* after obtaining a license, if he shall qualify at the first term thereafter of the *circuit court* of *any* county or corporation of the *circuit in which he resides*. (V. C. 1873, c. 160, § 3, 4.)

No justice, clerk, sheriff, or sergeant, or deputy of either, or any person interested in the profits of any such office, shall act as attorney at law in the court to which such office appertains, under the penalty of \$30. (V. C. 1873, c. 160, § 8.)

The United States courts for the most part recognize and admit the practitioners in the State courts to corresponding degrees in them. Thus, in the circuit courts, attorneys and counsellors, and solicitors and counsellors; and in the district courts, (being courts of admiralty), proctors and advocates also are admitted, according to the rules adopted by each court, which are generally based, like the rules of the supreme court, upon previous admission to some similar degrees in the courts of the State; whilst in the supreme court the requisite is that the applicant should have been an attorney and counsellor *for three years previous* in the supreme court of the State to which he belongs, and that his private and professional character shall appear to be fair. (1 Abb. U. S. Pr. 269-'70.)

3°. Mode in Virginia, of Superseding Attorney's License for Mal-Practice.

Any court before which any attorney has been qualified, on proof being made to it that he has been convicted of *any felony*, may *supersede his license*. (V. C. 1873, c. 160, § 5.)

An attorney's license may also be superseded or suspended by the *circuit court* for *mal-practice* therein, or in the county or corporation court; and by the *court of appeals* and *special court of appeals*, there may be exercised

"the like power over attorneys practising in those courts respectively." The proceeding for *mal-practice* is to summon the attorney to show cause why an *information* should not be filed against him; and if an *information* is ordered, the court (even the court of appeals), may cause a jury to be impannelled to try the same, when, if the attorney is found guilty, the court may suspend his *license* for a time, or *annul it*. (V. C. 1873, c. 160, § 6; Fisher's Case, 6 Leigh, 619). But these provisions do not affect the power of any court to require from an attorney therein security for his good behavior, or to fine him for a contempt of the court. (V. C. 1873, c. 160 § 7; Wells' Case, 21 Grat. 510.)

For that *mal-practice* which consists in a contempt of the court, *in its presence* at least, the court may fine and imprison as for other contempts, and may, as a further punishment, suspend or annul the attorney's license so far as it authorizes him to practise *in that court*, but not as to the courts of the Commonwealth generally. That can be done only upon *information filed*, and that although the offence were committed in the presence of the court. (Fisher's Case, 6 Leigh, 624, 628; The King v. Davison, 4 B. & Ald. (E. C. L.) 329.)

But in all cases, however summary the proceeding, *he must be heard before he is condemned*. The principle that there must be a citation before hearing, and hearing or opportunity of being heard before judgment, is essential to the security of *all private rights*. (*Ex-parte* Robinson, 19 Wal. 512-'13; *Ex-parte* Bradley, 7 Wal. 364; Bradley v. Fisher, Id. 354.)

When an attorney is illegally disbarred, the remedy most appropriate, in order to restore him, is by writ of *mandamus*, and an *appeal* from the order seems to be improper. (*Ex-parte* Robinson, 19 Wal. 513-'14; *Ex-parte* Bradley, 7 Wal. 364), *sed quære!* In Virginia the proceeding is by writ of error. (Fisher's Case, 624.)

How far counsel is punishable as for contempt, for advising and assisting his client to adopt legal measures, through another court, to obstruct or prevent the execution of the judgment or decree of the court first acting in the case, was considered in Wells' Case, 21 Grat. 500. In that case, the very reasonable doctrine was laid down, that for an attorney *corruptly to conspire* with his client to obstruct the due administration of the laws, by resisting or hindering the execution of the lawful decrees of a court, by whatever contrivance, even though it should be by procuring the interference of another court, which had no appellate or supervisory power, or jurisdiction of the subject matter of the suit, in abuse of its powers, to inhibit the execution

of such decrees, renders him guilty of a contempt of court, and justly liable to summary punishment. But when the attorney has acted in *good faith*, although he may have erred in judgment, he is not liable. To vindicate his conduct it is not necessary to show that he was right in his opinion, but only that he was acting in *good faith*, for what he believed to be the interest of his client, and not from disrespect to the court, or from a design to oust it of its *lawful jurisdiction*. (S. C. p. 509.)

Mal-practice in attornies consists of a great variety of professional improprieties; as for example, such acts as appearing in cases without being employed; protracting suits by disingenuous artifices; dealing unfairly with clients; colluding with them to deceive the court; demanding fees for pretended services not rendered; maintenance, champarty, stirring up suits, &c. (Synopsis. Crim. Law, 142, 213; 2 Tuck. Com. 47-'8; Bac. Abr. Attorney, (H) Fisher's Case, 6 Leigh, 619; Wells' Case, 21 Grat. 208-'9.)

4°. Nature and Extent of Attorney's Authority; His Privileges and Liability; W. C.

1°. Nature and Extent of Attorney's Authority.

The *authority* of an attorney to represent his client is properly and formally conferred by what is called a *warrant of attorney*. This, however, in Virginia, is disused in practice, although in case of reasonable suspicion that no authority has been given, the court may demand that the proof of it should be exhibited; yet, in general, the declaration of the professional man himself suffices to prove his representative character. (Howard v. Rawson & als, 2 Leigh, 733; Osborn v. U. S. Bank, 9 Wheat. 738; Bac. Abr. Attorney, (C); Fisher v. March, 27 Grat. 773 & seq.)

The authority of an attorney when appointed *continues*, unless revoked, until judgment, and for a year and a day afterwards, in order to *sue out execution*, and for a longer time if the power to sue execution be kept alive; but if not, the judgment is supposed to be satisfied, and to make it appear otherwise the plaintiff must again come into court, which he either does by *scire facias*, or an action of debt on the judgment, and then a *new authority* is necessary for the attorney. It is held, however, that an attorney has power to sue out a *writ of error* without any special authority. But the doctrine and the practice in the several States vary considerably in respect to the continuance of the attorney's authority. (Bac. Abr. Attorney, (D) & (C); Grossmor v. Danforth, 16 Mass. 74; Wilson v. Smith, 22 Grat. 506.)

An attorney may bind his client by assenting to an ar-

bitration, even though the client had expressly desired him *not to refer*. So he may agree to an enlargement of the time for making an award; may remit damages; may waive any advantage in the pleading; and may even release one of the defendants to the action, and take judgment against the others, but not enter a *retraxit*, because that is a *perpetual bar*, and in the nature of a release finally *from the demand*, and not merely *from the action*. (Bac. Abr. Attorney, (D); Yarsmouth v. Russel, 2 Ld. Raym. 1142; Hill v. Bowyer & als, 18 Grat. 378-'9; Holland v. Trotter, 22 Grat. 143.)

By virtue of the authority implied in his being attorney on the record, he may receive and grant a valid acquittance for the money recovered in the suit, unless a notice to the contrary be given. (Bac. Abr. Attorney (D); Henderson v. Johnson, 1 Wash. 10; Branch v. Burnley, 1 Call. 147. Johnson v. Gibbons, 27 Grat. 635.) But he has no power, by entering into a *collateral agreement*, to destroy a right of action in his client, by taking bonds, notes, or property in possession, in satisfaction, or anything but *money*. Hence, if an attorney takes from the debtor a third person's bond to collect, it is no satisfaction of the client's demand, although the attorney receives it as such. However, so much as is actually received *in money*, by the attorney upon the collateral security, so taken by the attorney, will discharge the debtor *pro tanto*. (Bac. Abr. Attorney (D); Herbert v. Alexander, 2 Call. 498; Smock v. Dade, 5 Rand. 639; Windrum v. Parker, 2 Leigh, 361; Wilkinson v. Holloway, 7 Leigh, 227; Smith's Adm'r v. Lambert, 7 Grat. 138.) The question has arisen whether, during the late war, it was admissible for an attorney to receive, in behalf of his client, Confederate currency; and it being held that the responsibility of an attorney is that of an ordinary bailee, it has been repeatedly determined that as during the war gold had ceased to be a currency, and had become a *commodity* of purchase and sale, to receive debts in the only existing currency might be justified, as not improper on the part either of attorneys at law, or of general agents, where the authority to collect *must have contemplated* the receiving of such currency. But the power of a collecting agent, *by the general law*, is limited to receiving for his principal that which the law declares to be a legal tender, or which is by common consent considered and treated as money, nay, and *passes as such at par*. In order that he may be justified in receiving a depreciated currency, there must be some *special circumstances* showing that expressly, or by implication, his au-

thority warranted it. (Ward v. Smith, 7 Wal. 452; Alley, &c. v. Rogers, 19 Grat. 383-'4; Ewart v. Saunders, 25 Grat. 207.) And it has also been held, that it was no breach of duty, nor could be considered as making the money his own, for an attorney or agent to deposit the funds received in a bank to a *special account*, separating it thus from his own money (e.g. to "*collection account*"), or to deposit it in his *own name* to his general account, if he had no money of his own in bank during the time; so that, if the bank failed, and the money was lost, it was the loss of the client or principal, and not of the attorney or agent. (Pidgeon v. Williams' Adm'r, 21 Grat. 251; Davis Comm'r v. Harman & als, 21 Grat. 203-'4; Hale v. Wall, 22 Grat. 433.) It should be observed, however, that whatever an attorney does in behalf of his client, although it exceed his authority, as by receipt of a depreciated currency, or otherwise, is considered as ratified by the client, if upon being notified of it, he does not promptly disclaim the act. (Johnson v. Gibbons, 27 Grat. 636 & seq; Law v. Crop, 1 Black, 539.)

In general, every mere authority is liable *to be revoked* at pleasure, and is *impliedly revoked* by the death of the author of the power; nor for the most part, is the case of an attorney an exception to either branch of the proposition. We shall see that in England, for as much as attornies are officers of the *courts of law*, neither the client nor the attorney can recede from his engagement, without the *sanction of the court*; but in the *courts of equity*, the solicitor's power may be revoked or surrendered, at the absolute pleasure of either party. It is the general doctrine, that the *death of the client* determines the attorney's authority; insomuch, that without renewed powers from the representative of the deceased, he cannot even revive the suit. (Bac. Abr. Attorney (C); Wood v. Hopkins, 2 Penn. 689; Campbell v. Kincaid, 3 Monroe (Ky.), 566.) But in Virginia, it is held that the death of the client does not put an end to the attorney's powers; and that the authority to act for the new parties, both in reviving the suit, and in acting for them after revivor, must be presumed to exist, in the absence of evidence to the contrary. (Wilson & Wife, &c. v. Smith, 22 Grat. 506. See Hill v. Mendenhall, 21 Wal. 453.)

2^d. Attorney's Privileges.

The *privileges of attornies* are next to be noted, which are conferred, it will be observed, for the *benefit of their clients*. Thus, they are *exempt from arrest* in civil causes, Bac. Abr. Attorney (G); Comm'th v. Ronald, 4 Call. 98); and also from *serving as jurors* (V. C. 1873, c. 158, § 2); and

in Pennsylvania, they are privileged from serving as overseers of the poor, supervisors of roads, constables, and other such officers. (Bac. Abr. Attorney (G); *Rasp v. Fisher*, 1 Yeates, 350.) Attornies are allowed to examine the papers in the clerk's office, paying the clerk no fee therefor if *the cause be still pending* (V. C. 1873, c. 180, § 10), and may withhold papers belonging to a client until their fees be paid. So also, they have a lien on the client's funds *in transitu* in their hands, or in the hands of the opposite party or of the officer; and on application of the attorney, the court will direct the money to be paid to the attorney; and payment to the client, after notice from the attorney, without reserving the amount of his fees, will be in the payer's own wrong, and will expose him to pay such fees out of his own pocket. (2 Tuck. Com. 49; Bac. Abr. Attorney (P).)

3^d. Attorney's Liabilities.

On the other hand, an attorney is liable to his client for any damages sustained by him by the attorney's neglect, or ignorance of his professional duty. (V. C. 1873, c. 160, § 9.) The ignorance, it seems, *must be gross*, and the negligence *ordinary*, in order to charge the attorney; and he is protected when he acts to the best of a reasonable skill and knowledge, and without such culpable neglect. (*Stephens v. White*, 2 Wash. 211; *Pitt v. Yalden*, 4 Burr. 2061; *Parker v. Rolls*, 14 C. B. (78 E. C. L.), 706.) Thus, an attorney is liable for the consequences of ignorance, or non-observance of the rules of practice of the court; for the want of care in the preparation of the cause for trial (as for example, the want of a declaration, or of a plea, &c.), or in procuring the attendance of witnesses, if he takes that duty upon himself; and for the mismanagement of the cause in particulars ordinarily allotted to counsel, or in that case assumed by him; whilst on the other hand, he is not answerable for errors in judgment upon points of new occurrence, or of nice and doubtful construction. (Chit. Cont. 556; *Godefroy v. Dalton*, 6 Bingh. (19 E. C. L.), 460; *Reece v. Rigby*, 4 B. & Ald. (6 E. C. L.), 202; *Hunter v. Caldwell*, 10 Q. B. (59 E. C. L.), 81; *Marsh v. Whitmore*, 21 Wal. 178.)

The remedy against an attorney for professional default is, for the most part, by action of trespass on the case in assumpsit, or less frequently trespass on the case, (1 Chit. Pl. 153, 115); but in a very plain and gross case of misconduct, application may be made to the *equitable power* of the court by motion in the cause wherein the wrong occurred. (*Pitt v. Yalden*, 4 Burr. 2060; *Barker*

v. Butler, 2 Wm. Bl. 780; Russell v. Palmer, 2 Wils. 325; Fowkes v. Pratt, 1 P. Wm. 593; Bac. Abr. Attorney, (H).)

It is not the attorney's duty to collude with his client to put in sham defences and pleadings that he knows to be false, nor even to comply with his client's instructions by doing what is merely *meant for delay*. And, therefore, no action can be maintained against him for omitting to do any of these things; nay, whilst such sham defences and false pleadings may not be, and independently of some special rule, are not void, yet the attorney who puts them in, knowing their character, is liable to pay the costs arising out of them, and to be otherwise punished for *mal-practice*. (Bac. Abr. Attorney (D); Vincent v. Groom, 1 Chit. (18 E. C. L.) 182; Merrington v. Becket, 2 B. & Cr. (9 E. C. L.) 18; Pierce v. Blake, 2 Salk. 515; Johnson v. Alston, 1 Campb. 176.) So an attorney is not obliged by his duty to his client to violate any moral duty as a *man*, or as a *citizen*. (Wells v. Comm'th, 21 Grat. 508.)

The measure of damages in an action against an attorney for negligence, is the *loss sustained* by reason of the neglect; for which no general rule can be laid down; but in fact when the circumstances are known, it is usually not difficult to estimate it. (Chit. Cont. 869 & seq.; Sedgw. Dam's, 104-'5.) Where the injury consists in the loss of a debt, by the attorney's default, the measure of damages was formerly held to be the *principal of the debt* without interest. (Rootes v. Stone, 2 Leigh, 650); but at present in Virginia interest may be allowed in the discretion of the jury, and probably would generally be allowed. (V. C. 1873, c. 173, § 14.)

There is one species of misconduct of attorneys, so flagrant and disgraceful, that a very summary remedy, and an exemplary penalty are provided for it, namely: the *failure to pay money collected for clients*. The amount may be recovered by warrant before a justice, or by suit or motion in court, (according to the sum withheld); and damages in lieu of interest, *not exceeding fifteen per cent per annum*, until paid, may be awarded against the delinquent, who in respect to the same is denied by the express terms of the Constitution any *homestead exemption*. (V. C. 1873, c. 160, § 10; Va. Const. 69, Act xi., § 1.)

The *duties of an attorney* involve the faithful and unswerving maintenance of the *legal rights of his client*; but not at the expense of violating his obligations as a *man* or a *citizen*, (Wells v. Comm'th, 21 Grat. 508); and the inviolable preservation of the secrets intrusted to him in

his *professional capacity*, not only in the conduct of suits, but when for any purpose his professional services are called into requisition, as to give counsel, or to prepare a document, &c. These secrets he cannot be constrained, nor indeed *will be permitted* to reveal without the consent of the client, to whom, and not to him, the privilege belongs. (1 Greenl. Ev. § 237, &c; Parker v. Carter, 4 Munf. 273; Lyle v. Higginbotham, 10 Leigh, 75-'6; Chahoon's Case, 21 Grat. 836, &c.)

The privilege, it will be observed, continues indefinitely, and extends to *all cases of professional employment or consultation*, and not merely to suits, (1 Greenl. Ev. § 240; 2 Tuck. Com. 48; Parker v. Carter, 4 Munf. 273). Nay, though the retainer be declined, in consequence of the fraudulent designs of the client, the attorney is still *not permitted* to divulge his disclosures, (Cromack v. Heathcote, 2 Bro. & Bingham, (6 E. C. L.), 4). The rule, for similar reasons, is extended to *interpreters* between counsel and client, and also to attorney's clerks, as being necessary auxiliaries to attorneys and counsel in the administration of justice; but it is not extended to a student in a lawyer's office, nor to a minister of religion, to whom a penitent's confession is made. (1 Greenl. Ev. § 239; Id. § 247; 2 Tuck. Com. 48.)

Provision is made with us by statute for the performance by counsel of a new function, namely: to *act as judge* in the courts of original jurisdiction, (*i. e.* in the county, corporation and circuit courts,) when the regular judge is so situated as to render it improper in his judgment for him to decide, or to preside at the trial of any *civil cause* pending therein. The parties, plaintiff and defendant, select the individual with the consent of the judge entered of record, and thereupon, the person selected proceeds in the same manner, and with like powers, as the judge of the court would have, were he sitting. (V. C. 1873, c. 155, § 25.)

As to the *dissolution of the relation* of attorney and client, it seems that in the *common law courts* the relation cannot be changed *without a judge's order*. And the judge should always take care to provide in his order, that papers shall not be taken out of the attorney's hands, *until his costs are paid*, (Walmesley v. Booth, 2 Atk. 27; Twort v. Daysell, 13 Ves. 196; Cowell v. Simpson, 16 Ves. 281.) In the *courts of equity* the rule is different. A solicitor may decline to proceed with a suit (Commesell v. Poynton, 1 Swanst. 1,) or the client, without any application to the court, may change his solicitor, (Creswell v. Byron, 14 Ves. 272,) whilst fraud or unfair advantage

on either side is prevented, in the one case by allowing the discharged solicitor to retain the client's papers until the costs, justly due, are paid, (*Ross v. Laughton*, 1 Ves. & Beame, 350); and in the other case, by disallowing to a solicitor, who refuses to proceed with a suit, any lien on the funds in the court for his costs, and by qualifying his lien even on papers in his hands so as to prevent his impeding the hearing of the cause. (*Creswell v. Byron*, 14 Ves. 272, *Merryweather v. Mellish*, 13 Ves. 162; *Mayne v. Watts*, 3 Swanst. 95.)

In respect to the *compensation of attornies*, the policy so long and so vainly persisted in of prescribing and limiting their fees was abandoned at the revival of 1849, so that since that period an attorney may make any contract for fees with his client; and it will be valid, and may be enforced like other contracts, (V. C. 1873, c. 160, § 11); nor does it seem to be material whether the contract is express or implied, so that, if no contract be proved, the attorney will be entitled to recover a fair and adequate compensation for his services. It should be observed, however, that the clerk is not authorized to *tax against the losing party* any other attorney's fee (whatever the successful adversary may have *actually paid*), than the very inconsiderable sums prescribed by law, in most cases not to exceed \$2.50 in a *court of law*, and \$15 in a *court of equity*, and even in the *court of appeals* no more than \$20.

If an attorney receives his fee, and then dies before the business is completed, it is considered the better opinion, that his representatives are not bound to refund. The *engagement as an attorney*, it is said, is the consideration of the fee, and the party having been prevented by death from performing his part of the contract, is in no default therefor, nor can there be any apportionment in such a case. (2 Tuck. Com. 49; 2 Evans' Pothier, 43.)

SECTION II.

2^b. The Several Classes of Courts.

Let us consider, (1), The several classes of courts in England; and (2), The several classes of courts in Virginia, including those of the United States which assist in administering justice to the people of Virginia;

W. C.

1^a. The Several Classes of Courts in England.

Very considerable changes in the system of English courts having been wrought by the Judicature Act of 1873, and the amendments thereto, it will be proper to advert to (1), The

several classes of courts existing in England prior to the recent legislation ; and (2), The several classes of courts as organized by that legislation ;

W. C.

1^d. The Several Classes of Courts Existing in England prior to the Recent Legislation.

See 3 Bl. Com. 30 & seq ; Bac. Abr. Courts, &c.: Court of Parliament, Court of Chancery, Court of King's Bench, Court of Common Pleas, Court of Exchequer, Court of the Earl Marshal, &c., Court of *Oyer and Terminer*, Court of Assize and *Nisi Prius*, Court of Sessions of Justices of the Peace, the Ecclesiastical Courts, the Court of Admiralty, the Palace Court, the Courts Palatinate, the Courts of the Royal Franchise of Ely, Courts of the Forest, the Sheriff's Törn, the Court Leet, the County Court, the Hundred Court, the Court Baron, Courts of the Cinque Ports, the Courts of the *Stannaries*, the Court of Commissioners of Sewers, Court of *Pipowders*, the Courts in London.

These *titles*, transcribed from Bacon's Abridgment, will present, in the most accessible form, the most important learning touching the English courts ; a learning, most of which is indispensable to a well-educated lawyer to know, and nearly all of which it is interesting and desirable to be acquainted with. Blackstone's exquisite analysis and classification will make it not difficult either to acquire or retain such knowledge.

Following that analysis, it is proposed to advert, (1), To the courts of general jurisdiction throughout the realm ; and (2), To the courts of private or special jurisdiction ;

W. C.

1^o. The Courts of *General Jurisdiction* throughout the Realm.

This very large class of courts is incomparably the most important ; and as no lawyer, affecting to be well informed, can be ignorant of their character and functions without reproach and discredit, the student is exhorted patiently to master the brief abstract which follows now, and at a more convenient season go over them, as presented in Bacon, under the several titles above, and that notwithstanding the radical changes therein wrought by recent legislation.

Let us next observe the subordinate classes included under this great head, namely : (1), The courts of common law and equity ; (2), The courts ecclesiastical ; (3), The courts military ; and (4), The courts maritime ;

W. C.

1^f. The Courts of *Common Law and Equity*.

This to ordinary practitioners is the most important class under this most important head ; although the courts ecclesiastical and courts maritime also demand close at-

tention. The several courts of *common law and equity* may be enumerated thus, namely:

- (1), Court of *Pie Poudre*;
 - (2), Court Baron;
 - (3), Hundred Court;
 - (4), County Court;
 - (5), Court of Common Pleas;
 - (6), Court of Exchequer;
 - (7), Court of King's Bench;
 - (8), Court of Chancery;
 - 1, The *Ordinary* Court of Chancery,
 - 2, The *Extraordinary* Court of Chancery, or
Court of Equity;
 - (9), Court of Exchequer-Chamber;
 - (10), House of Peers;
 - (11), Courts of Assize, and of *Nisi-Prius*.
- See 3 Bl. Com. 30, &c.;

W. C.

1st. Court of *Pie-Poudre*.

The court of *pie-poudre* is a *court of record*, incident to a fair or market. It is held by the steward of him who hath the franchise of the fair or market. Its jurisdiction extends to administer justice for all *commercial injuries* done in *that very fair or market*, and not in any preceding one. So that the injury must be done, complained of, heard and determined within the compass of *one and the same day*, unless the fair or market continues longer. As, therefore, it is the *lowest*, so it is at the same time, the *most expeditious* court of justice known to the laws of England. Lord Coke's etymology of the designation, *pie-poudre* is as if *curia pedis pulverizati*, because justice is there done as speedily as *dust can fall from the foot*; but the etymology given by Barrington, in his "Observations on Ancient Statutes," is commended by Blackstone as more satisfactory. He derives it from *pied-puldreaux* (a *peddler*, in old French) and, therefore, signifying the court of such petty chapmen as resort to fairs or markets. As this court is a court of record, a *writ of error* lies to it from the superior courts at Westminster. (3 Bl. Com. 32.)

2nd. Court-Baron.

The *court-baron* is a court incident to every manor in England. It is holden by the steward of the lord of the manor; but the *judges* who determine all questions there arising are the *freeholders*, the tenants of the lord, who are the *pares* (*peers*) of each other, and are bound by their feudal tenure to assist their lord in the domestic dispensation of justice. Its most important business is to determine, by *writ of right*, all controversies relating

to the right of lands within the manor; but it may also hold plea of personal actions, where the debt or damages do not amount to forty shillings. But as the proceedings may be removed into the higher courts by writs contrived for the purpose, it is in modern times of little practical account in the judicial system of England. It is *not a court of record*, and, therefore, *no writ of error* lies to its judgments, although, by means of a writ of *false judgment*, its decisions may be reviewed in the courts at Westminster. (3 Bl. Com. 33-'4; Bac. Abr. Court Baron, (p. 778).)

3^d. Hundred Court.

The *hundred court*, like the court-baron, is not a *court of record*. It is only a larger court-baron, being held for all the inhabitants of a particular *hundred*, instead of a *manor*. The free suitors here also are the judges, as in the case of a court-baron, and the steward of the lord of the hundred is only the registrar, as he is in the former court. It has the same jurisdiction over causes as the court-baron, and for a like reason, has fallen into similar disuse with that court. (3 Bl. Com. 34-'5; Bac. Abr. Hundred Court, (p. 777).)

4th. County Court.

The *county court*, which is *not a court of record*, is a court incident to the jurisdiction of the sheriff. The *freeholders of the county* are the judges, and the sheriff is the ministerial officer. It may hold pleas of debt, or damages under the value of forty shillings; and by virtue of a writ called a *justicies*, it may take cognizance also of many real actions, and of all personal actions. It is held monthly, and at a very early period was a court of great dignity and splendor; the bishop and the earl, with the principal men of the shire, sitting therein to administer justice, both in lay and ecclesiastical causes. Its dignity, however, was much impaired when the bishop was, by his ecclesiastical superiors, prohibited, and the earl neglected to attend it. And in modern times, as proceedings are removable hence into the superior court, as from the hundred courts and courts-baron, the same disuse of bringing actions therein has ensued as in those courts. (3 Bl. Com. 35-'6; Bac. Abr. County Court, (p. 776).)

The justices of the peace also hold courts in every county, which, however, are distinguished from the *county courts*. The justices' courts are known as *sessions*, and are courts of *quarter sessions*, or *general sessions* for the whole county, which are held four times a year; and *special sessions*, held on particular occasions, or for the several divisions into which the county is distributed for

matters of *local police*. The quarter or general sessions, besides the charge of the police of the county, have a criminal jurisdiction of considerable importance, embracing the lessor felonies, and all misdemeanors. The general sessions may summon a grand jury, and is believed to be a *court of record*. (3 Steph. Com. 43; 4 Do. 335, &c.; Bac. Ab. Court of Sessions, (p. 715).)

These four are the several species of common law courts which, though found everywhere throughout the realm, are nevertheless of a partial jurisdiction, so that each court is confined in its cognizance to limited districts; although provision is made that they may communicate with and be members, as it were, of the *superior courts* of a more extended and general nature, which are calculated for the administration of redress, not in any one lordship, hundred or county only, but throughout the whole kingdom, of which sort are the courts of this class yet remaining to be mentioned. (3 Bl. Com. 37.)

5^s. Court of Common Pleas.

This court is a *court of record*. It is sometimes denominated the court of *common bench*. Its jurisdiction is of *pleas* or causes between *private* (or *common*) persons, and it has exclusive cognizance of *real actions*. It was the first branch lopped off from the court of *aula regia*, being created by *Magna Charta*, (16 John, A. D. 1215). In order that private subjects might not be obliged to follow the king wherever he might be in England, to obtain justice, which was felt to be a very great grievance, but which was unavoidable as long as the court of *aula regia* (which sat always in the hall of the king's palace,) was the only court of general jurisdiction in the kingdom, the statute of *Magna Charta* enacts that "*communia placita non sequantur curiam regis, sed teneantur in aliquo loco certo.*" And this certain place was established in Westminster Hall, the place where the *aula regia* originally sat when the king resided in London, and there it has ever since continued. The judges of the court of common pleas, until 1831, consisted of a chief-justice and three *puisné* judges; but by statute of that year, (11 Geo. IV, and 1 Wm. IV, c. 70,) the number of *puisné* judges was increased to four, and has since, by statute, been augmented to five. So that until 1873 the court consisted of six judges, a chief and five *puisné* justices, which is the number also in the two following courts. (3 Bl. Com. 37 & seq; 1 Do. 22-'3 & seq; 3 Steph. Com. 402 &c., 406.)

6^s. Court of Exchequer.

The *court of exchequer* is also a *court of record*, and may be considered as the second branch lopped off from

the *aula regia*, which took place in the time of Edward I, apparently by an effort of royal power, without the aid of Parliament. Originally it was charged only with those causes which concern the *king's revenue*, but by what is known as the fiction of *quo-minus*, (namely: that the plaintiff was the *king's debtor*, and by reason of the wrong done him was *the less able* to satisfy the king), it came to extend its jurisdiction to *all personal actions*. From the time of the separation of the exchequer from the *aula regia* down to 1842, it was sub-divided into a court of equity and a court of common law. But by statute of that year (5 Vict. c. 5), its equitable jurisdiction was transferred to the court of chancery; and since that period it has been a *court of revenue* and a *court of law* only. Its judges for many ages were four in number, namely: one chief-baron and three puisné barons. But by 11 Geo. IV, and 1 Wm. IV, c. 70, the number of judges was increased to five, and until 1873 was six, namely, one chief and five puisné barons. (3 Bl. Com. 43 & seq; 3 Steph. Com. 397 & seq; 400 & seq; Bac. Abr. Court of Exchequer, (p. 698).)

The court is called the *exchequer* (*scaccarium*) from the old French word *eschequier*, from the *chequed cloth*, resembling a chess-board, which used to cover the table there, and on which, when certain of the king's accounts were made up, the sums were marked and scored with counters. (3 Bl. Com. 44; Bac. Abr. Court of Exchequer, (p. 698).)

7^s. Court of King's Bench.

The court of king's (or queen's) bench is a *court of record*. It is the remnant of the *aula regia*, and like that, purports to be presided over *by the king* (or queen) *in person*, although, in fact, the monarch has not, within the definite memory of man, had any voice in its deliberations. It possesses the *residuum* of jurisdiction which once belonged to the *aula regia*, which has not been parcelled out to the two last-named, or to other courts; and in the course of ages has considerably usurped the cognizance originally assigned to the common pleas. It keeps all inferior jurisdictions within the proper bounds, either removing their proceedings to its own forum, or *prohibiting* their progress below. It superintends all civil corporations in the kingdom. It commands magistrates to do what their duty requires, in every case where there is *no other specific remedy*. It protects the liberty of the subject by speedy and summary interposition; and it takes cognizance both of *criminal* and *civil* causes. On the plea side, or civil branch, it has original jurisdiction of all actions for trespass or other injury alleged to be

committed *vi et armis*, of actions for forgery of deeds, maintenance, conspiracy, deceit, and actions on the case which allege any falsity or fraud ; all of which savor of a *criminal nature*, although the action is brought for a *civil remedy*, and make the defendant liable in strictness to pay a fine to the king, as well as damages to the injured party. The same doctrine is now extended to all actions on the case whatsoever ; but no action of debt, or of detinue, or any other mere civil action can, by the common law, be prosecuted by any subject in this court, by original writ issuing out of *chancery*. And yet this court might always have held plea of any civil action (other than *actions real*), provided the defendant were an *officer of the court*, or in the *custody of the marshal* or prison-keeper of this court, for a breach of the peace, or any other offence. And, in process of time, it began, *by a fiction*, to hold plea of *all personal actions* whatsoever, and has continued for ages so to do, it being *surmised* that the defendant is arrested for a supposed trespass, which he never has in reality committed or been charged with ; and being thus pretendedly in the custody of the marshal of the court, the plaintiff is at liberty to proceed against him *for any other personal injury*, either by breach of contract, or by tort ; which surmise of being in the marshal's custody the defendant is not at liberty to dispute. And thus, by this fiction (as in the court of exchequer, by the fiction of *quo minus*), the three great law-courts of the realm, the common pleas, exchequer, and king's bench, have, as to *personal actions*, a precisely concurrent jurisdiction. The judges of the court were, until 1831, four in number, namely, a chief and three *puisnés*, which number was increased by statute of that year, as above-stated, to five, a chief and four *puisnés*, and until 1873 was six, a chief and five *puisnés*. (3 Bl. Com. 41 & seq ; 3 Steph. Com. 403, &c. ; Bac. Abr. Court of King's Bench, (p. 670).)

8^g. Court of Chancery ; W. C.

1^h. The Judges of the Court of Chancery.

The judges of the court of chancery for many ages have consisted, until recently, of only the Lord Chancellor and the Master of the Rolls. The great increase of business has made it indispensable to increase the number of judges in the court, until, of late, instead of *two*, there were *seven*, namely, (1), The lord chancellor ; (2), The lords justices of appeal, two in number ; (3), The master of the rolls ; and (4), The vice-chancellors, in number *three*.

The master of the rolls and the vice-chancellors have each a separate court of his own, exercising a concur-

rent jurisdiction; from which an appeal lies to the *court of appeal* in chancery, which is composed of the lord chancellor and the two lords justices, and thence to the House of Lords;

W. C.

1^a. The Lord Chancellor.

See 3 Bl. Com. 46-'7; 3 Steph. Com. 407-'8; Bac. Abr. Court of Chancery, (p. 681.)

2^a. The Lords Justices of Appeal.

3^a. The Master of the Rolls.

See 3 Bl. Com. 55, n (21); 3 Steph. Com. 417-'8.

4^a. The Vice-Chancellors.

See 3 Bl. Com. 55, n (21); 3 Steph. Com. 418.

2^b. The two Divisions of the Court of Chancery.

The court of chancery in England consists of two distinct tribunals, namely, the *ordinary* court, being a *court of common law*, and the *extraordinary* court, being a *court of equity*;

W. C.

1^a. The Ordinary Court of Chancery.

The ordinary court, which is a *court of record*, is, as we have seen, a court of *common law*. It is said by Blackstone to be much more ancient than the other branch, the court of equity, (3 Bl. Com. 47); although Lord Campbell conceives their antiquity to be the same. (1 Campb. Lives of Chan. 30.) The jurisdiction of the ordinary court, or perhaps it would be more accurate to say its *function*, is:

(1), To hold plea upon a *scire facias* to repeal and cancel the king's letters-patent, when made against law, or upon untrue suggestions.

(2), To hold any plea of petition of right, *monstrans dedroit*, traverse of office, and the like, where the Crown, upon mis-information, has invaded the subject's rights of property; and,

(3), To issue (as from an *officina justitiæ*) all original writs that pass under the great seal, all commissions of bankruptcy, idiocy, lunacy, and the like, for which the court is *always open* to the subject, in order that he may demand *ex debito justitiæ*, any writ that his occasions call for. (3 Bl. Com. 47 to 49; 3 Steph. Com. 408 to 410; Bac. Abr. Court of Chancery, 681.)

2^a. The Extraordinary Court of Chancery.

The *extraordinary court* of chancery, or *court of equity*, acquired its anomalous powers and jurisdiction by slow degrees. It is *not a court of record*, and yet has become a court of the greatest judicial consequence, and in the jurisprudence of Virginia, and of most of

the other States of this Union, holds a place not less important than in England. The courts of equity, however, in this country have, for the most part, cognizance, not only of the subjects which belong to the *extraordinary* court in England, but of most of those also which belong to the *ordinary court*, as to cancel letters-patent which are illegal or improperly obtained, and to hold plea to redress wrongs done by the government to the rights of property of the citizen, &c. The court is not, however, with us an *officina justitiæ*, where writs are manufactured; every court here issuing for itself the writs which it has occasion to use, so that properly we have no *original*, but only *judicial* writs;

W. C.

1^k. The Origin and Progress of the *Extraordinary Jurisdiction* of the Court of Chancery.

The origin of most of the branches of the *extraordinary or equitable jurisdiction* of the court of chancery in England, is referred to several distinct causes operating at periods far separated in point of time, some working so slowly and gradually that their effects can only be observed by comparisons instituted at long intervals, and others accomplishing very marked results at a definite era;

W. C.

- 1^l. The unreasonable rigor of the clerks in chancery, or their remissness in omitting to devise new writs, *transgressionis super casum* (notwithstanding the peremptory mandate contained in the Stat. 13 Edw. I, c. 24), and the illiberality of the judges in declining to extend the remedial effect of existing writs to new cases.

See 3 Bl. Com. 49-51; 3 Steph. Com. 410 to 412.

- 2^l. The Power and Influence of the Barons and great Nobles in over-awing, resisting or perverting the ordinary administration of justice, through the Courts, by *combination* or otherwise.

See 1 Campb. Lives of Chan., 32; 1 Spence's Eq. Jur. 342-3, &c.

- 3^l. The frequent Inadequacy of the only Remedies obtainable in the Courts of common law.

See 1 Campb. Lives of Chan. 32.

- 4^l. The Introduction into England of *Uses and Trusts*. (A. D. 1370, 43 Edw. III.)

See 3 Bl. Com. 51; 1 Spence's Eq. Jur. 442, &c., 346, &c.

Whenever, in any of these cases, the subject was

unable to find in the ordinary courts complete and satisfactory redress for his wrongs, he carried his grievances to the foot of the throne, where they were heard and disposed of before the king himself; either in the great council of the realm, that is, in the *parliament*, or in his lesser and more select council, of which the chancellor was, for the most part, a chief member, and being at once the most learned, and the most permanent, he monopolized by degrees the sole adjudication of all such extraordinary causes, (1 Campb. Lives of Chan. 30 & seq.; 1 Spence's Eq. Jur. 328 & seq.)

2*. The present Criterion of the *Extraordinary Jurisdiction* in Equity.

In modern times, a criterion of *equity-jurisdiction* is adopted, corresponding to the causes in which it originated, and which cherished its growth, namely: the *insufficiency of the remedy at law*, in any given case. For it may be assumed as a rule *well nigh universal*, that if there is a right, and no remedy at law, or an *inadequate one*, to enforce it, a proper remedy will be afforded *in equity*, if the case *admits of a remedy*. (1 Stor. Eq., § 33; Alderson v. Biggars, 4 H. & M. 470; Nicholson v. Hancock, Ibid. 491; Spotswood v. Higginbotham, 6 Munf. 313; Poin-dexter v. Waddy, 6 Munf. 418; Thornton v. Spotswood, 1 Wash. 142; Smith v. Marks, 2 Rand. 449; Brown v. Street, 6 Rand. 1; Coffman v. Sangston & als, 21 Grat. 263; Mason v. Nelson, 11 Leigh, 227; Holland & ux v. Trotter, 22 Grat. 141.)

3*. The Nature of *Technical Equity*, as understood in England and the United States.

It is obvious from what has been said, that the term *equity*, as employed in England and in the American States, has a signification very different from the same term in the general sense of Grotius, namely, "*the correction of that wherein the law by reason of its universality is deficient.*" The English and American equity so incessantly alluded to in the text-writers, is well defined by Judge Story to be, "that portion of remedial justice which is exclusively administered by a court of equity, as contradistinguished from that portion of remedial justice which is exclusively administered by a court of common law." (1 Stor. Eq. § 25 & seq.) The same writer further discriminates between the courts of equity and the courts of common law, by reference to the particulars following, namely:

(1), The different *natures of the rights* which they are respectively designed to recognize and protect.

e. g.: Trusts, and equitable estates generally; injuries arising from mistake, fraud, or accident; many cases of penalties and forfeitures; cases of imposition and unconscionable bargains, &c.

(2), The different *natures of the remedies which they apply.*

e. g.: The specific performance of certain contracts; injunctions to prevent irremediable wrongs, &c.

(3), The different *natures of the forms and modes of procedure* which they adopt.

e. g.: Determining contested facts by the court instead of by a jury; deriving proofs from discoveries made by the parties, as well as from disinterested witnesses; taking evidence in writing in the shape of depositions, and not by the oral examination of witnesses in the presence of the court, &c.

9^s. Court of *Exchequer-Chamber*.

The court of exchequer-chamber was a *court of record*, and, until superseded by the judicature act of 1873, was exclusively an *appellate court*, having no *original* cognizance whatsoever. It was composed of the judges of any two of the superior courts of Westminster Hall, to revise the judgments of *the third*. Thus, in the court of exchequer-chamber, the judgments of the common pleas were revised by the justices of the king's (or queen's) bench and the barons of the exchequer; the judgments of the court of exchequer by the justices of the king's (or queen's) bench and of the court of common pleas; and the judgments of the king's (or queen's) bench by the justices of the court of common pleas and the barons of the exchequer. (3 Steph. Pl. 419; 3 Bl. Com. 55-'6.)

10^s. House of Peers.

The house of lords (or peers), besides being one branch of the legislature, whose concurrence is necessary to every act of legislation, is also the *supreme court of judicature* in the kingdom in civil causes, succeeding in that particular to the cognizance of the *aula regia*. It is a *court of record*. (3 Bl. Com. 56.)

It cannot but strike one with a sentiment of astonishment, that a people so practical as the English should have acquiesced for so many centuries in an arrangement which submits the decisions of the highest juridical talent and learning of the realm, in equity as well as at common law, to be reviewed and corrected by a body, the great bulk of whose members have received no legal

education whatever, and who, from their hereditary wealth and social position, are not likely to be much interested in legal inquiries, nor to be willing to divert a great deal of attention from their private affairs and from their legislative duties, to inform themselves as to the precise merits of the causes which come before them. The theoretic absurdity, however, is mitigated by the accompanying circumstances, and is largely compensated by some practical advantages. Thus, although most of the peers are without any systematic knowledge of law, there are always in the House certain lords who have been advanced to the peerage (as chancellors or chief-justices) by reason of their eminence in the profession, and these are usually safe and trust-worthy guides. The peers may, besides, and sometimes do, call upon all the judges of England to advise them as to the law. And the compensating advantage is that the tribunal is one of very august dignity, is incapable of any possible taint of corruption, and gives assurance to litigants before it, not only of an upright decision, but of one where the justice of the case has not been overwhelmed by technicality. The profession in England has been generally well satisfied with its determinations; but of late the rage for innovation, which like a flood has swept away so many ancient land-marks of the law, has threatened, and has ere now subverted this break-water against the surges of popular agitation, (36 & 37 Vict. c. 66, § 20); although by a subsequent statute the appellate cognizance of the lords has been restored. (39 & 40 Vict. c. 59, § 3.)

11^a. Courts of *Assize and Nisi-Prius*.

Courts of assize and *nisi-prius* are auxiliaries to the three law courts of Westminster Hall above-named, namely, the courts of King's Bench, Common Pleas, and Exchequer; being composed of two or more commissioners, who are, twice in every year, sent by special commission from the Crown, all round the kingdom, to try by a jury of the respective counties, the truth of such *matters of fact* as are then under dispute in Westminster Hall; to take the verdict of a peculiar species of jury, called an *assize*, summoned for the trial of *landed disputes*, and to *hear and determine* accusations for crimes committed in the counties severally. (3 Bl. Com. 57.)
W. C.

1^b. The Functions of such Courts as *Courts of Assize*.

As *courts of assize*, the commissioners (who are usually justices of one or other of the courts at Westminster, although sometimes *sergeants*, and more recently, *barristers* also, are appointed on the commission,) in-

quire, by means of *grand juries*, into any treasons, felonies, or misdemeanors done in the county to which they are come, and by means of *petit juries* hear and determine all criminal charges. Their commission also empowered them, formerly, to inquire of all *disseisins*, (illegal dispossessions of lands,) and to restore such as had been disseised of their lands or tenements to the possession of them, by means of the *writ of assize*, which means a *sitting* (assidere), and gave its appellation to the court, partly because of the *sitting of the court*, and partly because, also, of the peculiar and extraordinary jury which tried such land causes. (3 Bl. Com. 57 & seq; Id. 184; 3 Steph. Com. 421 & seq; Bac. Abr. Courts of Justices of Assize, (p. 713); Id. Courts of Justices of Oyer and Term, (p. 709.)

2^b. The Functions of such Courts as Courts of *Nisi-Prius*.

As courts of *nisi-prius*, the commissioners are authorized by their commission to try such issues of fact as are joined in the courts of Westminster, in their *proper counties*, that is, in the counties severally where the facts occurred. The phrase *nisi-prius* arises thus: The actions being all brought in one of the courts of Westminster, notwithstanding the parties live, and the occurrences happened, in the remotest parts of the kingdom, wherever, in the course of the altercation between the litigants, the one affirmed and the other denied an *allegation of fact*, issue was said to be *joined thereon*, and it was referred to a jury to determine on which side the truth lay. Regularly this jury should have been convened at Westminster, and yet must have come from the body of the county where the facts were stated to have taken place. To save the intolerable annoyance to the jurors, and the intolerable expense to the parties of bringing the former up to London, the *justices itinerant* were required to take the records down to the counties and try the issue *there*. So, by the process of summoning the jury, (the writ of *venire facias*,) the sheriff of the county where the issue is to be tried, is commanded to summon the jurors to be by a given day at *Westminster* to try the issues, *unless before* that time (*nisi prius*) the justices come into the sheriff's own county, on their semi-annual circuit, as they are sure to do; when the jurors, instead of going to Westminster, are summoned to the assize-town of their own county. (3 Bl. Com. 59; 3 Steph. Com. 422, 424; Bac. Abr. Courts of Justices of Assize and *nisi Prius*, (p. 713.)

2^c. The Courts *Ecclesiastical*.

The courts ecclesiastical, or church-courts, are *not courts of record*. In the time of our Saxon ancestors there was no distinction between the lay and the ecclesiastical jurisdiction; the county court was as much a spiritual as a temporal tribunal; the rights of the church were ascertained and asserted at the same time and by the same judges as the rights of the laity. For this purpose the bishop of the diocese, and the alderman (or *earl*), or in his absence, the *sheriff* of the county, used to sit together in the county court, and had there the cognizance of all causes, as well ecclesiastical as civil, a superior deference being paid to the bishop's opinion in spiritual matters, and to that of the lay-judges in temporal. This moderate and rational system was very obnoxious to the clergy, who, upon the conquest by William the Norman, set on foot an effort which, in the time of Stephen, culminated in the final withdrawal of ecclesiastical persons and ecclesiastical causes from the temporal courts, and making them subject exclusively to the bishop's jurisdiction (A. D. 1135.) And shortly afterwards, in the same reign (A. D. 1138), the breach was widened, and a coalition rendered impracticable by the introduction into England of the Roman law, the passionate addiction of the clergy thereto, and the adoption of it in the church-courts as the rule of proceeding, while the temporal courts adhered to the laws of England. (3 Bl. Com. 61 & seq; Bac. Abr. Ecclesiastical Courts.)

The ecclesiastical courts, which wield what Blackstone terms a *contentious*, and not a *voluntary jurisdiction* (which latter need not be referred to), are as follows (beginning *with the lowest*), namely:

- (1), Archdeacon's court;
- (2), Consistory court of the bishop;
- (3), Court of arches;
- (4), Court of peculiars;
- (5), Prerogative court of the archbishop;
- (6), Judicial committee of the privy council.

The jurisdiction and order of dignity of these courts is essential to the American practitioner, not merely as a matter which it is discreditable to an educated lawyer not to be acquainted with, but also, and much more, because most of the law relating to testamentary and matrimonial causes amongst us, as in England, depends on adjudications in these courts, so that it is not less important to know it in respect to these courts than to know the jurisdiction respectively, and the order of dignity of the English courts of common law and equity;

W. C.

1st. Archdeacon's Court.

The archdeacon's court is the lowest in the series of church-courts. It is holden by the archdeacon, or in his absence by a judge appointed by him, and called his *official*. His jurisdiction is sometimes in concurrence with, and sometimes in exclusion of, the court of the bishop, to which, however, there lies always an appeal. (3 Bl. Com. 64.)

2^d. Consistory Court of the Bishop.

The consistory court of every bishop is held in their several cathedrals, for the trial of *all ecclesiastical causes* arising within their respective dioceses. The judge of the court is the bishop's chancellor or commissary. It is often called the court of the *ordinary*, which properly means the *bishop himself*, or one exercising immediate jurisdiction *in his own right and not by deputation*, but by usage, it is applied to the bishop's commissary or official. (3 Bl. Com. 64; 2 Jac. Law Dict. Ordinary; 1 Th. Co. Lit. 225.)

The appeal from the consistory court of the bishop is to the court of the archbishop of that province. (3 Bl. Com. 64.)

3^d. Court of Arches.

The court of arches is a *court of appeal* belonging to the Archbishop of *Canterbury*. It is held by the *dean of the arches*, as the official of the archbishop, at present at *doctor's commons*, but formerly in the court of Saint Mary le bow (*Sancta Maria de arcubus*; from the fashion of the pillars of the steeple, bent *arch-wise*), whence the court derives its name. Its original and proper jurisdiction was over the *thirteen peculiar parishes in London*, which are exempt from the jurisdiction of the bishop of London, and are subject immediately to the metropolitan. It has become the archbishop's court of appeal by the office of *dean of the arches* having been long united with that of the archbishop's commissary, or principal official. (3 Bl. Com. 65.)

The archbishop of York has in his province a court of appeal, corresponding to the *court of arches* in the province of Canterbury.

4^d. Court of Peculiars.

The courts which exercise an ecclesiastical jurisdiction, exempt from the control of the ordinary of the diocese, are called *peculiars*, and may be either regal, archiepiscopal, episcopal, or archdiaconal. Of these exempt jurisdictions there are fifty-seven within the province of Canterbury, dispersed through its various dioceses, embracing, it seems, one or more parishes each, and all of them belong to the archbishop, who adminis-

ters the jurisdiction through a single court, denominated the *court of peculiars*. It may be said to be a branch of the *court of arches*, and is at any rate held by the same judge. The appeal was formerly to the *king in chancery*, but now it is understood to be to the *court of arches*, although there seems to be an incongruity in appealing from the judge of the *court of peculiars*, to the same person as judge of the *court of arches*. (3 Bl. Com. 65; 3 Steph. Com. 431; Bac. Abr. Ecclesiastical Courts, (A), 6, (p. 720); Id. (B), (p. 724.)

5^s. Prerogative Court of the Archbishop.

This court was formerly held for the trial of *testamentary causes*, where the deceased left *bona notabilia* (goods exceeding £5 in value) within two different dioceses. It was held, of course, by a judge appointed by the archbishop of the province. (3 Bl. Com. 66; 2 Do. 509.)

But by the "Court of Probate Act" of 1857, (20 & 21, and 21 & 22 Vict. c. 77, 95), the jurisdiction over wills and administrations, &c., is transferred to a newly established court, called "The Court of Probate," with a principal registry in London, and district registries throughout the kingdom. Thus, the *testamentary jurisdiction* is wholly wrested from the ecclesiastical courts. (Wms. Pers. Prop. 305, 328.)

The jurisdiction of the ecclesiastical courts over *matrimonial causes* has been likewise extinct since 1858, having been transferred by 20 & 21, Vict. & 21 & 22 Vict. c. 108, &c., to a court known as the "Court for Divorce and Matrimonial Causes." (Wms. Pers. Prop. 360.)

The reports of the ecclesiastical courts since the latter period (1858) have had, therefore, little or no interest for the American practitioner; but those anterior to that date are of as much importance as ever.

6^s. Judicial Committee of the Privy Counsel.

This is the modern substitute for the former supreme appellate court in ecclesiastical causes, namely: the *court of delegates*, and the court of commissioners of review. (3 Bl. Com. 66; Bac. Abr. Ecclesiastical Courts, 9, 10, (pp. 721-'2); 3 Steph. Com. 432, 434; 2 Do. 482-'3; 1 Insts. Com. & Stat. Law, 77-'8.)

3^d. The Courts *Military*; W. C.

1^s. Court of Chivalry.

The court of chivalry is held by the *Earl-Marshal of England*. It is the only *permanent* military court in the kingdom. It is *not a court of record*. Its jurisdiction embraces *contracts* and other matters touching *deeds of arms and war*. (3 Bl. Com. 68; 3 Steph. Com. 435.)

2^d. Courts Martial.

Courts martial are applicable only to *soldiers and sailors* in service; and to them only in pursuance of an *annual mutiny-act*, so that if that act were not *annually renewed*, the whole military and naval armament of Great Britain would cease to exist for want of the means to enforce obedience. Hence, the Crown is constrained not to intermit the sitting of parliament for so much as a year at any time. (1 Bl. Com. 415; Bac. Abr. Soldiers (F); De Hart's Mil. Law.)

In the United States, courts martial are applicable only to persons in the *naval or military service* of the United States, or *militia* in actual service. (Const. U. S. Amend'mts V; *Ex-parte* Milligan, 4 Wal. 2.)

See 1, For *Military Courts Martial*.

1 Bright. Dig. 79 to 83, § 237 to 283; 2 Do. 24 to 27, § 113 to 132; Rev. Stats. U. S., 212, 213, § 1198 to 1203; Id. 236 to 240, § 1342, Art. 64, &c.

See 2, For *Naval Courts Martial*.

1 Bright. Dig. U. S. Stats. 663 to 667, § 65 to 95; 2 Do. 319 to 323, § 48 to 71; Rev. Stats. U. S. 281 to 284, § 1624, Art. 26, &c.

See 3, For *Militia Courts Martial*.

1 Bright. Dig. U. S. Stats. 622, § 20 to 23; Rev. Stat. U. S. 289, § 1658.

4^t. The Courts Maritime.

The maritime courts are such as have power and jurisdiction to determine all maritime causes or matters *arising upon the high seas*, whether civil or criminal, and whether arising out of contract or tort. They have cognizance also, by special commission from the Crown, issued under the great seal at the commencement of every war, over all manner of captures and prizes, made *upon the seas*, or by the aid of ships, to hear and determine them, according to the course of the admiralty and the law of nations. In exercising this occasional branch of its functions, the admiralty court is in England denominated the *prize court*, whilst as to the rest of its jurisdiction, it is denominated the *instance court*. (Bac. Abr. Court of Admiralty.)

The cases of *contract* which belong to the *instance* branch of the court embrace contracts of a *maritime character*, it would seem *wherever made*, whether on the land or on the sea; such as contracts of hypothecation of the ship or cargo, contracts of the mariners and subordinate officers for wages, where, as is generally the case independently of special agreement, the contract is on the *credit of the ship*; but *not* contracts for the wages of the *master*, for his

contract is usually on the *credit of the owners*, and not of the ship. (Bac. Abr. Court of Admiralty, (C).)

The cases of *Tort*, on the other hand, which belong to the same branch of the court, *depend wholly on the locality* where the torts are committed. And thence, (and with a view also, to the jurisdiction of the court over *crimes*), it becomes needful to define with accuracy the local limits of the *seas* to which the cognizance of the admiralty extends. This will be done more particularly when we come to consider the "wrongs cognizable in the several classes of courts." Let it suffice now to say, that it is laid down as a general rule in the English books of common law, that the admiral's jurisdiction is confined locally, to the *high seas*, and that he cannot take cognizance of matters arising in any river, haven or creek, *within the body of any county*; and that all matters arising within these waters are triable *by the common law*. But much controversy has prevailed as to what shall be counted the *high seas*, of which the practical result seems to be, that the *high sea* is to be understood as embracing, besides the sea itself, all bays and estuaries so wide that a witness on one side cannot so distinctly discern what is done on the other, as to be able to testify thereto, and to extend (as to the *exclusive* jurisdiction of the admiralty), only to *low water-mark*; but between high and low-water mark, the common law and admiralty have *imperium divisum*, that is, the one when the strand is *not*, and the other when it is, covered with water. (Bac. Abr. Court of Admiralty, (B), and (A), (D); 2 East. P. C. 802.)

The court of admiralty, in respect to both branches of its jurisdiction, is held before the *lord high admiral of England*, or his deputy, who is called the judge of the court, with courts of appeal, and also with vice-admiralty courts in the numerous colonies of Great Britain abroad. Since an early period in the reign of William and Mary, (say A. D. 1691), the office of high admiral has not been conferred on *any individual*, but has been *in commission*, as the phrase is; that is, it has been exercised by persons styled "Lords Commissioners for executing the office of Lord High Admiral of Great Britain and Ireland," or as they are styled in common speech, "Lords of the Admiralty." The judge of the court, though nominally the *deputy* of the lord high admiral, is really appointed by the Crown, by a commission under the great seal. The proceedings of the court are according to the method of the *civil law* like those of the ecclesiastical courts; upon which account it is usually held at the same place with the superior ecclesiastical tribunals, namely: at *doctor's*

commons in London, and not unfrequently by the same person as judge; but of course under a different commission. It is *no court of record* any more than the spiritual courts. (3 Bl. Com. 69; 3 Steph. Com. 435-'6.)

"*Doctor's Commons*," having been repeatedly mentioned as the seat of certain courts, it may be as well to say, that that is the popular designation of the courts and offices occupied by the collegiate body incorporated in 1768, under the name of "The College of Doctors of Law, (*i. e.* of the *civil and canon laws*) *exercercent* in the ecclesiastical and admiralty courts;" and which are situated on the southern side of St. Paul's Church-yard, London. The college consists of a *president* (the dean of the arches for the time being), and of those *doctors of laws* who having regularly taken that degree in either of the Universities of Oxford or Cambridge, and having been admitted *advocates* in due form, shall have been elected *fellows of the college* in the manner prescribed by the charter (Burrill's Law Dict. *Doctor's Commons*). It is styled, "*Doctor's Commons*" because the college consists of *doctors of law*, and *commons*, because the persons residing there live in a *collegiate commoning* together, the word "*common*" signifying, in old English, *puttance* or *allowance*, because it is served in common among the members of societies such as the colleges of the universities, the inns of court, &c., (Bouv. Law Dict. *Doctor's Com.*)

It remains to consider more particularly the courts which, in England, exercise this *admiralty jurisdiction*.

W. C.

1st. Court of Admiralty.

This is the court which exercises original jurisdiction in admiralty causes, wherever the cognizance of the vice-admiralty courts in the colonies for the ease and convenience of the subject, does not intervene. We have seen that it is *not a court of record*, and is held by a judge appointed by commission under the great seal, and usually the same person who is judge of the superior ecclesiastical court, both courts sitting at *Doctor's Commons*. The appeal formerly from the court of admiralty was to a *court of delegates*, convened by royal commission under the great seal. At present it is to the *judicial committee of the privy council*. (3 Bl. Com. 69, 70; 3 Steph. Com. 435-'6.)

2nd. Vice-Admiralty Courts.

The powers of the admiralty everywhere are derived from the *lord high admiral*, that is, from the lords commissioners, who exercise his functions as inherent in

and incident to that office. Accordingly, by virtue of their commission, the lords of the admiralty are authorized to erect courts of vice-admiralty in North America, the West Indies, the settlements of the East India company, and, as is supposed, in all the *colonial dependencies* of Great Britain. So in Great Britain, also, the lords of the admiralty may *ex-officio* appoint, in divers parts of the kingdom, vice-admiralty courts, which exercise admiralty jurisdiction in maritime affairs. And from all these vice-admiralty courts, whether abroad or at home, an appeal lies to the *high court of admiralty* above described. (2 Browne's Civ. & Adm. Law, 490 & seq.)

3^s. Judicial Committee of the Privy Council.

The judicial committee of the privy council (for whose constituent elements see 1 Insts. Com. & Stat. Law, 77-'8,) was prior to 1873, the common appellate tribunal (and the final one) in respect as well to causes decided in the court of admiralty as in those determined in the superior ecclesiastical courts. (3 Steph. Com. 437; 2 Do. 482-'3; 1 Insts. Com. & Stat. Law, 77-'8; 36 & 37 Vict. c. 66, § 18.)

2^o. The Courts of Private or of Special Jurisdiction.

The nature of these courts, which at times have had their close parallels in Virginia, although it is believed not at present, may very well be understood from the analysis which follows:

W. C.

1^f. Forest Courts.

These courts are for the government of the royal forests, (that is, extensive tracts of wood and intervening glade centuries ago set apart for settlement and cultivation, in order to afford to the monarch "the princely divertisement of hunting.") The population within their limits consisted wholly of the persons employed about the forest, as keepers, huntsmen, foresters, &c., and their families; but these amounted to so considerable a number that it was requisite to make special provision for administering justice amongst them, as well as protecting the forest-privileges. (3 Bl. Com. 71; Bac. Abr. Courts of Forest);

W. C.

1^s. Court of Attachments.

The court of attachments is *not a court of record*. It is held by the *verderors* of the forest every forty days, and has jurisdiction to *inquire into* all offences against *vert* (greensward) and *venison* (*de viridi et venatione*), and to certify them to the court of *sweinmote*, or justice-seat, but has no power to convict. (3 Bl. Com. 72.)

2^s. Court of Regard, or *Survey of Dogs*.

This also is *not a court of record*. It has jurisdiction

to inspect the *mastiffs* kept in the forest (the only sort of dogs allowed to be there), and see to their "*lawing and expeditation*;" that is, cutting off the claws and balls of their forefeet, to prevent them from chasing the deer. (3 Bl. Com. 72.)

3^s. Court of *Sweinemote*.

This is *not a court of record*. It is held by the verderors of the forest as *judges*, with the *sweins* or freeholders of the forest as *jurors*, thrice a year, to inquire into, and to punish oppressions committed by the officers of the forest, and also to receive and try the presentments from the court of attachments. (3 Bl. Com. 72.)

4^s. Court of *Justice-Seut*.

This, the principal forest-court, *is a court of record*. It is held by the chief-justice in *eyre* (*in itinere*) of the royal forests *every third year*, with jurisdiction to hear and determine all trespasses, &c., and all claims to franchises, &c., within the forest. (3 Bl. Com. 72-'3; Bac. Abr. Courts of Forest, (1).)

5^f. Court of *Commissioners of Sewers*.

This is a *court of record*. It is composed of certain commissioners, appointed *under the great seal*, for a designated district of country, and is charged with the supervision of repairs of sea-banks and sea-walls, cleaning rivers from obstructions and befoulments, and also ditches, and the like. (3 Bl. Com. 73-'4; Bac. Abr. Ct. of Com'rs of Sewers.)

6^f. Court of *Policies of Insurance*.

This seems *not to be a court of record*. It derives its powers from a commission issued under *the great seal* from time to time, in order to determine in a summary way, all causes concerning policies of insurance in *London*, with an appeal to the *court of chancery*. (3 Bl. Com. 74-'5; 3 Steph. Com. 444.)

4^f. Court of the *Marshalsea*, and *Palace Court*, at Westminster.

These are two distinct courts, *both of record*. The first is *very ancient*. The second was erected by letters-patent from the Crown, 6 Car. I, (A. D. 1634.) Both were instituted in order to facilitate the administration of justice between the *king's domestic servants*. (3 Bl. Com. 76-'7.)

5^f. Courts of the Principality of Wales.

These were all *courts of record*, but were abolished by Statute 11 Geo. IV, and 1 Wm. IV, c. 70, whereby the Welsh judicature was entirely incorporated with that of England. (3 Steph. Com. 455, n (F); 3 Bl. Com. 77-'8.)

6^f. Court of the *Duchy-Chamber of Lancaster*.

This seems to be *not a court of record*. It is held before

the chancellor of the duchy, or his deputy, and is a *court of equity* touching lands holden of the king in right of the duchy of Lancaster, *any where in the realm*. (3 Bl. Com. 78; Bac. Abr. Courts Palatinate (3), p. 760.)

- 7^t. Courts of the *Counties Palatine* of Chester, Lancaster, and Durham, and of the Royal Franchise of Ely.

See 3 Bl. Com. 79; Bac. Abr. Courts Palatinate, p. 755, &c.

These counties palatine and the franchise of Ely are abolished, or much modified, by act of parliament. (3 Steph. Com. 447-'8; 1 Do. 121-'2.)

- 8^t. Stannary Courts.

These courts appear to be *not courts of record*. They are held before the *lord warden of the Stannaries* for the purpose of administering justice cheaply and promptly among the tin miners of Cornwall and Devonshire. (3 Bl. Com. 80; Bac. Abr. Courts of the Stannaries, (p. 783).)

- 9^t. Courts within the *City of London*, and other *Corporations*.

These courts are believed to be *courts of record*. (3 Bl. Com. 81 to 83; 3 Steph. Com. 449 & seq.)

W. C.

- 1^s. Court of Hustings.

This is a *court of record*, held before the lord mayor and sheriffs of London, with the *recorder* of the city as judge, having jurisdiction of *all pleas*, real, personal, and mixed. (Bac. Abr. Courts in London, (p. 790, &c); 3 Steph. Com. 449, n (1).)

- 2^s. Lord Mayor's Court.

This is a court held before the lord mayor, but of which the *recorder* is virtually the judge. It has cognizance of personal actions where both plaintiff and defendant live in the city. (3 Steph. Com. 449, n (1); Bac. Abr. Courts in London, (3), p. 791-'2.)

- 3^s. Sheriff's Court.

This court, which is a *court of record*, and has cognizance of personal actions, is held by *each* of the two sheriffs of London. (Bac. Abr. Courts in London, (2), (p. 791).)

- 4^s. Court of Requests.

This court is held by *two aldermen* and *four commoners* of the city, and has jurisdiction over debts not over £10. (3 Bl. Com. 81-'2; 3 Steph. Com. 449, n (1).)

- 10^t. Chancellors' Courts of the two Universities.

These courts are held by the vice-chancellor of the University, or *his deputy*, and have cognizance of all civil suits, except cases of *freehold*, and all criminal charges, except mayhem and felony, where a scholar, servant, or

minister (i. e. supplier of the wants,) of the university is a party. (3 Bl. Com. 83-'4, & n (16); Bac. Abr. Universities, (B).)

- 2^d. The Several Classes of Courts in England as Organized under the Judicature Act of 1873, and the Amendments thereto.

Of the several classes of courts as organized under the judicature act of 1873, and the amendments thereto, extending from 1873 to 1877, the exposition must be very brief, and it is feared will be imperfect, for want of time to deal in detail with authentic *data*. For the substance of what is here stated the writer is principally indebted to a brief analysis of the new judicial system of England by Mr. Moak, in the Preface to 15 Moak's English Reports, p. xi. & seq; but reference has also been had to the exposition of the Judicature Acts by Lely & Foulkes.

It is believed that the principal change wrought has been rather in the organization than in the jurisdiction of the several courts; the statutes apparently having it in view to facilitate and hasten the administration of justice, by distributing the judges of each of the principal courts into sections or committees, which may be contemporaneously occupied, under the direction of their respective chiefs, in disposing of the causes pending.

The student will not fail to observe that these statutes relate not at all to the local courts, nor to the courts of private and special jurisdiction, but exclusively to the courts of general cognizance, and universal concern, namely: the courts of common law and equity, the courts of probate and matrimonial causes, and the courts of admiralty.

Let it be noted then, that we are to set forth, (1), The courts contemplated by the acts in question; (2), The manner of their organization; and (3), Their jurisdiction; W. C.

- 1^o. The Courts Contemplated by the Act of 1873, and the auxiliary Acts.

The courts contemplated by these acts, are by the statutes themselves distributed into three classes, namely: (1), The queen's high court of justice; (2), The queen's court of appeal; and (3), The house of lords. (Lely & F. Jud. Acts, Pref. xxxv, & seq.); W. C.

- 1^t. The Queen's High Court of Justice.

The high court of justice is clothed chiefly with original jurisdiction in its several divisions; but it exercises some designated appellate cognizance, and notably in the instance of *crown cases reserved*, where criminal causes involving important and doubtful questions of law are submitted to a divisional court, consisting of an extraordi-

nary number of judges, of whom the chief justice of England, the chief justice of the common pleas, and the chief baron of the exchequer, or one of them at least, must always compose a part.

The high court of justice consists of five *divisions*, namely: (1), The chancery division; (2), The queen's bench division; (3), The common pleas division; (4), The exchequer division; and (5), The probate, divorce, and admiralty division. (Lely & F. Jud. Acts, p. 33.)

W. C.

1st. The Chancery Division.

The chancery division consists of the members following, viz:

1, The lord chancellor, *as president*, who, however, is not to be deemed a permanent judge of the high court of justice;

2, The master of the rolls;

3, The three vice-chancellors, or such of them as shall not be appointed ordinary judges of the court of appeal; and

4, A new *puisné* judge; under an act of April, 1877.

2nd. The Queen's Bench Division.

The queen's bench division consists of,—

1, The lord chief justice of England, *as president*; and

2, Such of the other four judges of the court of queen's bench as shall not be appointed ordinary judges of the court of appeal.

3rd. The Common Pleas Division.

The common pleas division consists of,—

1, The lord chief justice of the common pleas, *as president*; and

2, Such of the other four judges of the court of common pleas as shall not be appointed ordinary judges of the court of appeal.

4th. The Exchequer Division.

The exchequer division consists of,—

1, The lord chief baron of the exchequer, *as president*; and

2, Such of the other four barons of the exchequer as shall not be appointed ordinary judges of the court of appeal.

5th. The Probate, Divorce, and Admiralty Division.

The probate, divorce, and admiralty division consists of,—

1, The judge of the court of probate, and of the court for divorce and matrimonial causes, *as president*; and

2, The judge of the high court of admiralty.

2^d. The Queen's Court of Appeal.

The court of appeal exercises appellate jurisdiction *ex-*

clusively, which extends to common law actions, and to causes in chancery and bankruptcy, and embraces also probate, matrimonial and admiralty causes. (Lely & F. Jud. Acts, p. 11, & seq.)

It is composed of, (1), Five *ex-officio* judges; and (2), Six *ordinary* judges. (Lely & F. Jud. Acts, 112, &c.); W. C.

1^s. The Five *Ex-officio* Judges.

The five *ex-officio* judges of the court of appeal, consist of, is—

- 1, The lord chancellor, *as president*;
- 2, The lord chief justice of England;
- 3, The master of the rolls;
- 4, The lord chief justice of the common pleas; and
- 5, The lord chief baron of the exchequer.

2^s. The six *Ordinary* Judges, styled *Lords Justices of Appeal*.

The six *ordinary* judges of the court of appeal are composed of two classes, both derived, however, from the high court of justice, namely:

- 1, Three judges made by the transfer of that number from the high court of justice; and
- 2, Three judges selected by the crown from the queen's bench, the common pleas, and the exchequer divisions of the high court of justice. (Lely & F. Jud. Acts, p. 112-'13.)

3^d. The House of Lords.

The house of lords retains its functions and powers to hear appeals from the court of appeal in England, and from the courts of Scotland and Ireland. (Lely & Jud. Acts, 105-'6.)

For the purpose of aiding the house of lords in this duty, provision is made for the appointment, by the crown, of two, and ultimately of four, "lords of appeal in ordinary." (Lely & F. Jud. Acts, 107-'8.)

Appeals in vice-admiralty causes lie to the high court of justice, and thence to the court of appeals, and finally to the house of lords. (Lely & F. Jud. Acts, 9, 11, 12, 105.)

2^s. The Organization of the Courts contemplated by the Act of 1873, and the Auxiliary Acts; W. C.

1^d. The High Court of Justice.

The topics to be considered in this connection, are: (1), The manner of holding the divisional courts; and (2), The number of judges required to be present at such courts; W. C.

1^s. The Manner of Holding the Divisional Courts composing the High Court of Justice.

The divisional courts of the high court of justice may be held for the transaction of any business which, by

law and by the rules of the court, may be heard in such divisional court *by a portion only of its members*.

2^d. The Number of Judges Required to be Present at such Courts.

Most causes in the high court of justice may be heard and determined by a single judge; but such causes as are not proper to be so heard shall be heard by a divisional court, and any number of divisional courts may sit at the same time. (Lely & F. Jud. Acts, p. 42-'3, 115.)

The divisional court is constituted of *two* of the judges of the court, *and no more*, unless the president of the division to which such court belongs, with the concurrence of a majority of the judges of such division, should think fit to require more than two. (Lely & F. Jud. Acts, 115.)

Crown cases reserved, however, are to be heard by at least *five judges* of the high court of justice, of whom, as we have seen, the lord chief justice of England, the lord chief justice of the common pleas, and the lord chief baron of the exchequer, or one of such chiefs at least, shall be part. Their decision is final, save as to some error of law upon the record, as to which no question was reserved for the consideration of those judges. (Lely & F. Jud. Acts, p. 47-'8.

2^d. The Court of Appeal.

The topics to be presented here are the same as under the preceding head;

W. C.

1st. The Manner of holding the Divisional Courts composing the Court of Appeal.

The orders for constituting and holding divisional courts of the court of appeal, as well as for regulating the sittings, and the sittings of the court of appeal itself, may be made and rescinded by the president of the court, with the concurrence of any three of the *ordinary* judges thereof. But no judge is to sit on the hearing of an appeal from any decision made by himself, or by any divisional court of which he was and is a member. (Lely & F. Jud. Acts, p. 114.)

2^d. The Number of Judges Required to be Present at such Court.

The usual number of judges of the court of appeal required to constitute a divisional court of appeal, is two or three, *and no more*; but every appeal from a final sentence must be heard by *at least three judges*, and from an interlocutory order by *at least two*.

3^d. The Jurisdiction of the Courts contemplated by the Judicature Acts.

For the jurisdiction of the courts contemplated by the

judicature acts, reference must be made to the acts themselves. (Lely & F. Jud. Acts, p. 36 & seq.)

2°. The Several Classes of Courts in Virginia.

In Virginia the *courts of the United States*, as well as the *courts of the State*, administer justice to our people, so that it will be needful to include in the view now to be taken of our judicial system, not the courts of Virginia only, but the Federal courts also. In this comprehensive sense the courts of which we are to speak are, (1), Courts maritime and of admiralty; and (2), Courts of law and equity;

W. C.

1^d. Courts Maritime and of Admiralty.

The courts which administer admiralty and maritime jurisdiction sit *exclusively* under the authority of the United States. They are, as we shall presently see, the *district courts of the United States*. Their *civil* cognizance extends to the following subjects, namely:

(1), *Maritime contracts*, wheresoever made.

See *Ante*, p. 193 & seq; 1 Abbott's U. S. Practice, 291.

(2), *Maritime torts*, committed on the high seas, or on any water navigable by vessels *used in commerce*, (say twenty tons burden and upwards,) whether the water be tidal or not, fresh or salt, wholly in one State or traversing several, *provided only* such waters communicate with, or give access to, *other States or countries*. (1 Abb. U. S. Pract. 348 & seq.)

(3), *Prize-Causes*.

Prize-causes are such as grow out of maritime captures in time of war, and these are by statute committed to the courts of admiralty. (1 Abb. U. S. Pract. 290-'91.)

(4), *Causes arising under the Revenue and Navigation Laws of United States*.

See Rev. Stats. U. S. Art. 563, (cl. 8); Id. Art. 629, (cl. 4); Desty's Fed. Proced. 22, 53.

2^d. Courts of Law and Equity.

See 3 Bl. Com. 30 to 61 to 68;

W. C.

1°. The Several Sorts of Courts of Law and Equity in Virginia; W. C.

1^f. Court of a Justice of the Peace.

2^f. County and Corporation Court.

3^f. Circuit Court.

4^f. Supreme Court of Appeals.

5^f. Federal Courts; W. C.

1^s. District Court of United States.

2^s. Circuit Court of United States.

3^s. Supreme Court of United States.

2°. The Organization and Jurisdiction of the Courts of Law and Equity in *Virginia*; W. C.

1°. The Constitution and Jurisdiction of the *Court of a Justice of the Peace*; W. C.

1°. The Constitution of the Court of a Justice of the Peace.

This court is held by a single *justice* of the peace, at *any place and time* within his county that he shall think fit; but he may, if he pleases, join with him one or more of his fellow-justices as his assessors and advisers. The judgment and responsibility are, however, *his alone*, and if after patiently hearing the opinion of his assessors he is not convinced, it is his duty not to suffer his own fixed and deliberate judgment to be overruled by the advice they give him.

Every county is divided into *magisterial districts*, and the voters of each district elect *three justices*, to serve *two years*. (Va. Const. 1869, Art. VII, § 2, (Amendments 1874); V. C. 1873, c. 6, § 9 & seq; *Id.* c. 48, § 1 & seq.)

2°. Jurisdiction of the Court of a Justice of the Peace.

Let us consider under this head, (1), The classes of of causes cognizable in a justice's court; and (2), The mode of proceeding in such court;
W. C.

1°. The Classes of Causes Cognizable in the Court of a Justice of the Peace.

In this connection we shall see, (1), The cases of *civil cognizance* belonging to a justice of the peace; (2), The cases of *criminal cognizance*; and (3), The cases of *police cognizance*;
W. C.

1°. The Cases of *Civil Cognizance* belonging to a Justice of the Peace.

The civil jurisdiction of a justice of the peace extends to any *claim to property* (doubtless *personal property*), or to any debt, fine, or other money which would be recoverable by action at law, or suit in equity, not exceeding in value or amount \$50 (exclusive of interest), or in case of a fine, not exceeding \$20. But where the amount or value exceeds \$20, the justice, on application of the defendant, at any time before trial, shall remove the cause to the *court of the county or corporation*, there to be proceeded in as if it were a motion under V. C. 1873, c. 163, § 6; (V. C. 1873, c. 147, § 1).

Also, where the possession of any house, land, or tenement is unlawfully detained by a tenant, or some

person claiming under him, the lease of such tenant being *originally* for a period *not exceeding one month*, the landlord's complaint of *unlawful detainer* is cognizable before a justice. (V. C. 1873, c. 130, § 1.)

Also, in those counties which adopt the *new fence law*, where any of the animals named in the statute (which are the usual domestic animals), trespass on the lands of another, the *damage* done may be recovered before a justice of the peace. (V. C. 1873, c. 97, § 18.)

The claim to *property* mentioned as one of the subjects of a justice's jurisdiction, does not embrace *freehold estates* in lands or tenements under any circumstances, (*Miller v. Marshall & als*, 1 Va. Cas. 158; *Warwick & als v. Mayo*, 15 Grat. 538 & seq.). Neither does either clause enable a justice to take cognizance in general of causes involving the breach of a contract to *do a collateral thing*, (*Pendred v. Pendred*, 2 Va. Cas. 93); nor a *fortiori*, of torts, save in the case above mentioned, of cattle trespassing; nor of disputes touching *terms for years*, except in the case of *unlawful detainer*, above mentioned; nor, as is believed, of any subject except a claim to a *personal chattel*; to a *specific sum* of money, in the nature of a *debt*; and to a *fine*. But see V. C. 1873, c. 48, § 7.

This latter provision, (V. C. 1873, c. 48, § 7), is as follows: "Any claim for damages to real or personal estate, or breach of any contract, where the amount sought to be recovered does not exceed \$20, shall be cognizable by a justice of the peace;" and if it is to be understood as law, the doctrine stated above cannot be maintained. But it is believed not to be law. It is an enactment of 1861-'62, by a legislature which sat at Wheeling, pretending to represent the State of Virginia, but composed of delegates from only a few counties, and they, for the most part, representing a minority of the population. The acts of that body have never, to the knowledge of the writer, been recognized by the people or General Assembly of Virginia, (unless, perchance, such recognition is found in an act of the *extra session* at Richmond in June, 1865, (p. 5);) and had the legislature considered the provision in question to be in force, it would have been superfluous to enact the special statute above-cited, giving a justice exceptional jurisdiction as to trespassing cattle. (*Ante*, p. 204.) The compiler of the Code of 1873 seems to have inserted the provision alluded to upon questionable authority.

Where the proceeding is for a debt due by penal bill, or bond with condition *to pay money*, the *penalty* at common law is esteemed the subject of controversy, and determines the question of jurisdiction, where that depends *on amount*. (Newell v. Wood, 1 Munf. 555; Heath v. Blaker, 2 Vas. Cas. 215.) But in Virginia, at present, the jurisdiction depends not on the penalty, but on the *principal sum* which is due. (V. C. 1873, c. 179, § 2.)

Three cases touching the amount of the demand, as regulating jurisdiction, merit special attention :

1st, The distinction between *payments* and *set-offs* respectively, when they reduce the amount of the claim below \$20.

Where the *original amount*, exclusive of interest, exceeds \$20, and has been reduced below that sum by *payments*, the plaintiff is taken to be cognizant of such payments, and, therefore, to know what amount is due. On the other hand, if the amount has been reduced to or below \$20 by *set-offs*; that is, by counter-demands in the nature of debts, on the part of the defendant, the plaintiff may either allow them, and proceed for the balance due, *before a justice*, or taking no notice of such *set-offs*, may sue in a court of record, that is, in the circuit or corporation court; being supposed, in the latter case, to be unacquainted with, or not obliged to admit the claims of his adversary. Hence, where the amount is reduced to \$20, or less, *by payments*, the plaintiff *must* sue in the justice's court; whilst, if reduced by *set-offs*, he may, as was said above, elect whether to sue there or in a court of record; and, therefore, wherever the jury find for the plaintiff twenty dollars or less, the amount sued for being greater, it is prudent where both *payments* and *set-offs* are claimed, for the plaintiff to get the jury to indicate in the verdict whether the amount was reduced by payments or set-offs. (1 Rob. Pr. (1st ed.) 18; Maitland v. McDearman, 1 Va. Cas. 131; Larowe v. Harding's Adm'r, 2 Va. Cas. 203; Ferguson v. Highly, 2 Va. Cas. 255.)

2nd, Where an *entire claim* exceeds \$20, and has been divided into several parts, each not exceeding \$20, and separate securities are taken therefor, and *all are due*.

It seems the better opinion in this case, that the courts of record cannot thus be deprived of their jurisdiction, nor the defendant of his right to *trial by a jury*, and that a *writ of prohibition* will be awarded

by the *circuit court*, in order to prevent the usurpation. (*Hutson v. Lowry & al*, 2 Va. Cas. 95.) So also, it may be remarked, a prohibition will be awarded, if a justice of the peace in any case usurp an illegal jurisdiction, as by taking cognizance of a controversy involving the *title to a freehold*, (*Miller v. Marshall & al*, 1 Va. Cas. 158; *Warwick v. Mayo*, 15 Grat. 528); or by transcending otherwise his lawful cognizance. (*Mayo v. James*, 12 Grat. 17; *West v. Ferguson*, 16 Grat. 270.)

3rd, Where a *fictitious credit* is entered, in order to reduce the amount to \$20 or less.

This also, it is believed, is inadmissible, being *in fraudem legis*. It deprives the courts of record of the jurisdiction which the law assigns them, and thus infringes upon public policy; and it takes away from the defendant one of the most important incidents of the contract as *he made it*, namely, the incident of *trial by a jury*. A *prohibition* should be applied for to the circuit court. (3 Bl. Com. 35 n (2); *McCall v. Peachy*, 1 Call. 55; *St. Amand v. Gerry*, 2 Nott. & M. C. 487; *Farror v. Summers*, 3 Litt. (Ky.) 460; See *Hansbrough & ux v. Stinnett*, 25 Grat. 496.)

But see *contra*, *Barnes v. Winkler*, 2 Carr. & P. (12 E. C. L.) 345; *Bowditch v. Salisbury*, 9 John, 366.
2^d. The Cases of *Criminal Cognizance* belonging to a Justice of the Peace.

The criminal cognizance of a justice of the peace embraces cases of *assault and battery, not felonious*, and *petit larceny*, in respect to which the jurisdiction is concurrent with that of the county, corporation and circuit courts, to be tried, however, in those courts *by a jury*; it also includes all petty misdemeanors punishable exclusively *by fine*, which *cannot exceed \$20*. It is another branch of a justice's criminal jurisdiction, to examine and commit to jail, or to admit to bail, persons charged with the graver offences, whether felonies or misdemeanors; and he is, moreover, clothed with power to require persons against whom just cause of suspicion is found to exist, to give security to keep the peace and be of good behavior. (V. C. 1873 c. 147, § 1); Id. c. 48, § 8, 9; Id. c. 196 § 1 & seq.)

3^d. The Cases of *Police Cognizance* belonging to a Justice of the Peace.

To this class of cases belong the *removal of a pauper* to his proper settlement; the arrest and treatment of *vagrants*, (V. C. 1873, c. 51, § 16, 18 & seq); the institution of proceedings against the *putative fathers of*

bastards, to oblige them to support their offspring. (V. C. 1873, c. 121, § 1.) Proceedings against those who sell or give away intoxicating liquors *on any election day*. (V. C. 1873, c. 8, § 39, 40.) Proceedings against those who *disturb religious meetings*, or who *sell intoxicating liquors* near them without license. (V. C. 1873, c. 192, § 19 to 22); and proceedings against *illegal retailers* of intoxicating liquors. (V. C. 1873, c. 196, § 10), with many others.

2^h. The Mode of Proceeding in the Court of a Justice of the Peace.

The ministerial officer who attends the justice and executes his precepts, is the *constable*, of which class of functionaries one is elected by the voters of each magisterial district, to serve for *two years*. A constable, however, is not confined to his district, but may act anywhere in his county or corporation. (Va. Const. 1869, Art. VII, § 2 (Amendments 1874); V. C. 1873, c. 6, § 13; Id. c. 12, § 1, 3, 6, 9; Id. c. 47, § 63, 1.)

The *course of proceeding* is to obtain from a justice of the peace a *warrant or summons*, requiring the constable to whom it is addressed to summon the defendant to appear before him, or some other justice of the county, on the day named, not exceeding thirty days from the date, to answer the complaint, the nature of which should be briefly recited. The warrant is to be made returnable to some place within the magisterial district where the defendant *resides*, or in which the cause of action arose, unless for good cause shown on oath, the justice shall prescribe a different place in the county or corporation. (V. C. 1873, c. 147, § 2.)

When a corporation is defendant the warrant is served on the chief officer, or in his absence from the county or corporation in which he resides, or in which is the principal office of the corporation, on the next subordinate, as in the case of process from a court of record, of which a particular account will be given hereafter. (V. C. 1873, c. 56, § 32; Id. c. 166, § 7, *Post. p.* .)

The justice may issue subpoenas for witnesses, and may punish them for non-attendance by a fine not exceeding \$5, (V. C. 1873, c. 147, § 3); and when the witness attends, but refuses to be sworn or to testify, the justice may commit him to jail until, in the custody of the jailor, he shall give his evidence. (V. C. 1873, c. 172, § 29.) But it is believed that he cannot compel the witness *to attend* by issuing an attachment himself, (notwithstanding the statute allowing a justice to punish summarily, *as a contempt*, disobedience to any law-

ful process issued by him, V. C. 1873, c. 190, § 27; Mayo's Guide, 259); but that he must report the delinquency to the court of his county or corporation which, by attachment, may compel the witness to attend and testify. (V. C. 1873, c. 172, § 28.)

The cause is to be tried (of course *without written pleadings*), according to the *principles of law and equity*, by the justice himself, without a jury; and judgment is given "for the sum due to *either party*, with interest, or for the property to which the plaintiff is entitled (or its value) with damages," and costs. (V. C. 1873, c. 147, § 4.)

When the judgment is rendered, it is the duty of the justice (which he is too apt to neglect), to enter in a book kept for the purpose, the date thereof, the names of the parties, and the amount; and also the date of any execution issued thereon, and to whom delivered. He is also required to write on the face of the paper, or writing on which the warrant issued, or on any writing allowed as a set-off, the date, amount of the judgment, and costs, and affix his name thereto, (V. C. 1873, c. 147, § 5); and a copy from the *entry in the justice's book*, of the *date of any execution* issued by him, and to *whom delivered*, is evidence in any proceeding against the officer named, for failing to make due return of such execution, or for failing to pay over money received thereon. (V. C. 1873, c. 147, § 11.)

If either party be dissatisfied with the justice's decision, he may ask for a new trial, but only of the justice who rendered the judgment, unless in case of his death, resignation, removal from office, or absence from the county, in which case it may be granted by another justice; nor can it be granted in any case, after the lapse of *thirty days* from the judgment, nor *at any time*, unless the opposite party *be present* at the time of the application, or unless after *five days' notice* to him (if in the county or corporation), of the time and place of the application. (V. C. 1873, c. 147, § 6.) In order that the justice may *properly* grant a new trial, it is not enough that one, or that all of the parties are dissatisfied with the decision. He must be convinced that, without a new trial, a *palpable wrong* will be done to the party applying for it, and that without any neglect or default on the applicant's part. (Mayo's Guide, 669, &c.; Synops. Crim. Law, 266, &c.; Post. p. .)

It is competent to the justice, where the judgment exceeds \$10, to allow a short interval of time before ex-

ecution shall issue, provided the party will give such security for the payment as the justice may deem sufficient. This *stay of execution* is longer as the debt is larger, thus :

Exceeding \$10, and not exceeding \$20, besides interest,	40 days.
" \$20, " \$30, " 60 "	
" \$30, " 90 "	

(V. C. 1873, c. 147, § 7.)

An *appeal* may be allowed from the judgment of the justice, where the matter in controversy, exclusive of interest, is of greater amount or value than \$10; or where the case involves the constitutionality or validity of an ordinance or by-law of a corporation. The appeal in the last case, that is, where the case involves the *constitutionality or validity* of an ordinance or by-law of a corporation, is to the *circuit court* of the justice's county or corporation; or otherwise to the county or corporation court. The appeal is to be granted by the justice rendering the judgment, but only within *ten days thereafter*, on such security being given as he approves for the payment of the same, and all costs and damages (if it be affirmed); the *verbal acknowledgment* of any surety in this case of appeal, (as in the case of the stay of execution), being *sufficient*, and the endorsement by the justice, of the name of the surety upon the warrant, being *conclusive evidence* of such acknowledgment. The court in which the appeal is cognizable may, on motion, for good cause shown, require *new or additional security*; and if not given, the appeal may be dismissed, and execution awarded on the judgment. (V. C. 1873, c. 147, § 7, 16.)

The appeal is to be tried in a summary way, without pleadings in writing, upon any legal evidence which may be produced by either party, whether it was produced to the justice or not, and is to be determined (as it ought to have been by the justice), according to the *principles of law and equity*. If the justice's decision be affirmed, execution issues against the principal and his surety, jointly or separately, for the amount of the original judgment, including interest and costs, with damages on the aggregate, at the rate of *ten per centum per annum*, from the date of the judgment till payment, and for the costs of the appeal; and the execution is to be endorsed "*no security to be taken.*" If the justice's decision is reversed, the appellant is to recover his costs; and such order or judgment is to be made or

given as ought to have been made or given by the justice. (V. C. 1873, c. 147, § 17.)

If there be no new trial, stay of execution, nor appeal, the justice may immediately issue an execution of *feri facias*; or if the judgment be for personal property, at the option of the plaintiff, may issue a *writ of possession* for the property, and a *feri facias* for the damages and costs; and in like manner, where there is a stay of execution, after the lapse of the time prescribed for the stay, executions may be issued. (V. C. 1873, c. 147, § 8.) No express provision appears to be made for an execution in the case of a justice giving judgment, in a proceeding for *unlawful detainer*, pursuant to V. C. 1873, c. 130, § 1, &c., unless we are to suppose the *general* statute of executions (V. C. 1873, c. 183, § 23) is applicable, as probably it is. We might come to that conclusion, however, with more confidence, if no provision had been made specifically for the issuing by justices of the writ of *feri facias* and of *possession*, in a single case.

The execution is to be directed to a constable; and may be executed by *any constable*, in *any county* that the plaintiff may designate, and shall be returnable within sixty days. (V. C. 1873, c. 147, § 9.)

If not wholly satisfied, the execution may, within one year from the judgment, be returned to and renewed by a justice, notwithstanding the provisions of chapter forty-nine of Code. But every execution issued by a justice, which is not so returned *and renewed*, shall be returned by the constable to the *clerk's office of his county or corporation*. And when, for any cause, it is unfit for a writ of *feri facias* to be directed to a constable, such writ shall be directed to, and executed by, a sheriff or sergeant of the county or corporation. The executions returned to the clerk's office by constables are docketed, indexed, and filed separately by the clerk; and such further executions may then be issued in the case (from the *clerk's office*) as if the justice's judgment had been rendered *in court*. (V. C. 1873, c. 147, § 9, 10.)

If the constable fail to make *due return* of an execution, he may, on ten days' notice, be fined from time to time by a justice, just as a sheriff or sergeant may be by a court of record for a similar delinquency, and on *his return* he may be proceeded against as a sheriff or sergeant might be on his. (V. C. 1873, c. 147, § 12; Id. c. 49, § 45; Id. c. 163, § 5.) And for money collected on execution, after as well as before the return-

day, or received by the constable on any claim entrusted to him to warrant for, and *recoverable by warrant*, he and his sureties are liable in very summary proceedings; and *after six months* from the date of any receipt for such claim, signed in his official character, such receipt is *prima facie* evidence of the receipt of the money, (V. C. 1873, c. 147, § 13); and that as well against the sureties as himself. (Smith & als v. Gov'r, 2 Rob. 231, &c.; McNeale, &c. v. Governor, 3 Grat. 306.)

An expeditious remedy, in the nature of an *interpleader*, is provided where a doubt arises as to the *title of property* on which a justice's execution or a distress warrant is levied, and where the property levied on is not of greater value than \$20. The claimant may obtain from a justice of that county or corporation a summons requiring both debtor and creditor to show cause why the property should not be discharged. The warrant or summons is returnable in not less than five days, and meanwhile the sale is to be postponed. Upon the hearing the justice shall order the property to be given up to the claimant, or shall dismiss the summons, as shall seem most proper. And if the value of the property exceeds \$10, an appeal shall be allowed by the justice, if asked for *within five days*, on security being given, as in other cases of appeal. (V. C. 1873, c. 147, § 14.)

2^d. The *Constitution and Jurisdiction* of the County and Corporation Court.

The county and corporation courts, until a few years ago, were constituted in precisely the same manner, and had exactly the same jurisdiction. At present, however, they differ so widely in their jurisdiction (although in their constitution they are still very similar,) that it will be expedient to consider them *separately*;

W. C.

1^a. Constitution, History, and Jurisdiction of the *County Court*; W. C.

1^b. The *History* of County Courts in Virginia.

The tribunal for more than two centuries, known by the appellation of *county court*, was a very peculiar and remarkable Anglo-Saxon feature in the distribution of the judicial power in Virginia. It was incorporated very early into the colonial administration of justice, and until 1870 maintained a prominent place in the domestic polity of the commonwealth.

In its original form, consisting of justices of the peace, who were plain country gentlemen for the most

part, without any technical acquaintance with the law, the court yet possessed a jurisdiction of *unlimited extent*, both in law and equity. It was variously estimated, being by some regarded as a strange deformity in the Constitution, whilst others looked upon it as exercising influences, direct and indirect, of a highly salutary character.

The late distinguished jurist, B. W. Leigh, who was always a zealous advocate of the county courts, as formerly constituted, in a note appended to the revised Code of 1819 (which was compiled by him by appointment of the General Assembly), thus deduces their history, and states his view of their effect :

“The institution of county courts originated as early as 1623-’4; and as it is the most ancient, so it has ever been one of the most important of our institutions, not only in respect to the administration of justice, but for police and economy. They were first called *monthly courts*, and at first only two of them were established [viz: in the counties of *Charles City* and *Elizabeth City*], and their jurisdiction jealously limited to the most petty controversies, reserving the right of appeal for the party cast, to the governor and council, who were the judges of what were then called the *quarter courts*. In 1642-’3, the style of *monthly courts* was changed to that of *county courts*, the colonial assembly having previously begun, and continuing thenceforward to enlarge their duties, powers and jurisdiction, and to extend the system to every county as it was laid off. As early as 1645, they had been matured into their present form (though somewhat rude and irregular), of courts of general jurisdiction in law and equity; and the most important duties in matters of police and economy were confided to them. See 1 Hen. Stats. 125-’7, 132, 145, 168, 185, 224, 272-’3, 302-’3, 4, 5, 310, 328, 335-’6, 345-’6, 8, 350, 398, 448, 462-’6-’9, 447-’8, 521-’2.

“In 1661-’2, the governor and council were constituted *justices itinerant*, to sit in and constitute the county courts; but that provision was repealed the next year. See 2 Hen. Stats. 64, 179.

“Hitherto the judges of the county courts had been styled *commissioners of the monthly courts*, and afterwards *commissioners of the county courts*; but in 1661-’2, it was enacted that they should take the oath of a *justice of the peace*, and be called *justices of the peace*. (Id. 70.) These tribunals now received a perfectly regular form, and their functions have ever since been considered as a part of the constitution, both of

the colonial and present government. No material change was introduced by the revolution in their jurisdiction or general powers and duties of any kind; *vide* the Revised Acts of 1748, Edit. of 1752, c. 7; Edit. 1769, c. 4; and the Revised Acts of 1792, Edit. 1794, 1803, and 1814, c. 67. It would perhaps be impossible for any man to *estimate the character and utility of this system*, without actual experience of its operation." (1 R. C. (1819), 244, c. 71, note *.)

These sentiments, so favorable to the beneficent results of the county court system, as it had so long existed, were reiterated and amplified by Mr. Leigh, in the constitutional convention of Virginia of 1829, and were confirmed and enforced by the most distinguished men in that remarkable body, who bore united testimony to the value of those tribunals as then organized; *e. g.* Messrs. Marshall (C. J.), C. Johnson, P. P. Barbour, J. Randolph, Giles, Upshur, &c. (Debates Va. Conv. 1829, 487 to 536.) And in conformity with the arguments then employed, that convention retained the system *unchanged*, Messrs. Madison and Monroe uniting their voices with the majority. By the constitution of 1851, the justices were made *elective by the people* for a short term, instead of being as before, appointed for life by the governor, upon the nomination of the county court; but in other particulars the system underwent no change; nor did it, by the constitution of 1864, framed at Alexandria by a mere handful of the people of the State, but still *Virginians*. It was not until 1869, that a convention, composed chiefly of men alien in sentiment and in interest to the Commonwealth, availed themselves of an accidental and temporary ascendancy, to strike down an institution which had become endeared to our people by the experience of more than two centuries, and by the approval of successive generations of our wisest and best men.

2^b. The *Present Constitution of the County Courts* in Virginia.

County courts still form a part of the judicial system of Virginia, but wholly changed in the manner of their constitution; and, by recent legislation, shorn of the greater part of their jurisdiction, as well in importance as in amount.

The constitution of 1869 directs that, in every county, there shall be a *county court*, to be held *monthly* by a judge *learned in the law of the State*, and to be known as the *county court judge*, provision being made for attaching *small* counties to adjoining ones. The judges

are to be chosen by the joint vote of the two houses of the General Assembly; to hold office for *six years*, and until their successors are qualified; and to reside, during their terms, in their respective counties or districts. (Va. Const. 1869, Art. VI, § 13, 11, 25.) They are commissioned by the governor, and in order to *secure their independence*, are to receive such salaries and allowances as may be determined by law, the amount of which shall *not be diminished* during their term of office; whilst, with a view to *assure a due responsibility*, they may be *removed from office* by a concurrent vote of both houses of the General Assembly; a majority of all the members *elected to each house* concurring in such vote, and the cause of removal being entered on the journal of each house. (Va. Const. 1869, Art. VI, § 22, 23.)

The compensation of a county judge is a salary of \$350, and \$20 for every 1,000 inhabitants over 10,000 in his county or district; and he is allowed, if a licensed lawyer, to appear as attorney-at-law in any case not pending in his court, or which cannot be carried into, or has not been taken from, his court on an appeal. (V. C. 1873, c. 154, § 18, 16; Acts 1875-'6, p. 152, c. 149.)

3^h. The *Jurisdiction of the County Courts*.

The constitution provides that the jurisdiction of the county courts shall be the same as that of the county courts then existing, except so far as it is modified by the constitution, or *may be changed by law*. (Va. Const. 1869, Art. VI, § 13.)

The *changes by law* have recently been very radical. Down to 1st August, 1873, the jurisdiction of these courts in *civil causes* was almost entirely co-ordinate with that of the circuit courts, embracing substantially *every case* not cognizable by a justice of the peace, and including also, appeals from him; whilst in *criminal cases* their cognizance was well-nigh exclusive; as it was also in respect to *matters of police*. But by act of 2d April, 1873, taking effect 1st August, 1873, their *criminal* jurisdiction was limited to misdemeanors, and they were deprived of cognizance of "*all causes at law and in chancery*." (V. C. 1873, c. 154, § 5, 7, 8.) Their *criminal cognizance*, however, is restored by Act of March 29, 1875. (Acts 1874-'5, p. 364.)

Let us consider, (1), *The civil cognizance* of the county courts; (2), *Their criminal cognizance*; and (3), *Their police cognizance*;

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1¹. The *Civil Cognizance* of the County Courts.

In respect to the very large mass of jurisdiction taken from them by the act of April 2, 1873, including "all causes at law and in chancery," and all prosecutions *for felony* (which last is altered by act of March 29, 1875,) it is provided that "the county court shall execute and enforce by proper process, and in the manner provided by law, every judgment, decree, or order heretofore entered therein, and shall supervise, *correct*, and enforce in like manner, any rule taken, or order, entry, or endorsement made, by the clerk of said court," (V. C. 1873, c. 154, § 6); and directions are also given for the removal to the circuit court of all causes at law and in chancery pending in the county court on the 1st August, 1873, such causes to stand in the circuit court in all respects as they stood in the county court. (V. C. 1873, c. 154, § 7.)

The *permanent* civil jurisdiction of the county courts embraces the granting of *letters of administration*, admitting of *wills to probate*, appointing of *guardians, curators, and committees of lunatics, &c.*, and hearing and determining of all *motions* and other matters made *specially cognizable therein by any statute*. (V. C. 1873, c. 154, § 4; Acts 1873-'4, p. 158, c. 144.)

The last clause retains to the county court no inconsiderable body of jurisdiction, of which it must suffice to name some of the most prominent instances; *e. g.*

The *auditing the ex-parte periodical settlements* of the accounts of personal representatives, guardians, curators, and committees, and taking in connexion therewith the necessary steps to compel such fiduciary to do his duty. (V. C. 1873, c. 128, § 4, 8, 10, 17, 18, 20, 28 & seq;)

Motions *on bonds returned to or filed in a county court, or its clerk's office, or given by any sheriff, sergeant or constable*. (V. C. 1873, c. 163, § 5; Sangster & als v. Comm'th, 17 Grat. 124;)

Cases of *caveat*, involving the question whether or not the register of the land office ought to issue a commonwealth's grant for lands, claimed on the one side to be waste and unappropriated, and on the other to *belong to the caveator*. (V. C. 1873, 154, § 12; Id. c. 108, § 29 & seq;)

Cases of *attachment for rent, or against an absconding debtor, &c.* (V. C. 1873, c. 148, § 6 & seq;)

Cases of *distress for rent reserved in part of the crop, &c.* (V. C. 1873, c. 134, § 15;)

Cases of *forcible or unlawful entry*, or *unlawful detainer*. (V. C. 1873, c. 130, § 1;)

Cases of *interpleader*, where a dispute arises as to the ownership of chattels levied on under an execution of *fiery facias* or a distress-warrant. (V. C. 1873, c. 149, § 2;)

Cases of *mandamus*, in respect to the action of the *board of supervisors* of a county, and of the boards of the magisterial districts. (V. C. 1873, c. 154, § 19;)

Cases of *habeas corpus*, where by affidavit or otherwise there appears probable cause to believe that one is *detained without lawful authority*. (V. C. 1873, c. 153, § 1, &c.); and,

Cases of *appeal* from the judgment of a justice of the peace, including, amongst other instances, a review of every decision of a justice of the peace convicting one of a misdemeanor, where the party convicted shall desire it. (V. C. 1873, c. 147, § 16; Acts 1875-'6, p. 448, c. 366.)

2^d. The *Criminal Cognizance* of the County Courts.

The county court has jurisdiction of all presentments, informations, and indictments for *misdemeanors*, (V. C. 1873, c. 154, § 5); and, *at present, for felonies* also, at least if it be *not arson or a capital felony*, so that if an indictment be found against a person for arson or any capital felony in the county court, if the accused is in custody, or if he appear according to his recognizance, he is to be *arraigned in the county court*, but is to be remanded *for trial*, if he so demands, to the circuit court. (V. C. 1873, c. 154, § 8, 10, 11; Acts 1874-'5, p. 364, c. 271.)

3^d. The *Police Cognizance* of the County Courts.

The subjects of the police cognizance of the county court embrace everything which involves or relates to the good order, health, or general convenience of the community, of which the following may be named as *instances*, namely:

The opening and discontinuance of *public roads and landings*; building of *county bridges*, &c. (V. C. 1873, c. 52, § 18, 23, &c., 34, 29, &c., 46, &c., 50, 55, 59, &c., 62, 63; Acts 1874-'5, p. 177 & seq, c. 181; Acts 1875-'6, p. 205, c. 264; Acts 1876-'7 p. 181, c. 194;)

The establishing and regulation of *ferries*, &c. (V. C. 1873, c. 64, § 4, 12, &c;)

The allowance of the *erection of mills*. (V. C. 1873, c. 63, § 1, &c;)

The supervision of *apprentices*, &c. (V. C. 1873, c. 122, § 1, &c., 12; Acts 1875-'6, p. 267, c. 223;)

The protection of *paupers*, and prevention of *va-grancy*. (V. C. 1873. c. 47, § 53, 55;)

The proceedings against the *putative fathers of bastards*; (V. C. 1873, c. 121, § 1, &c.; which statute is repealed *temporarily*; Acts 1874-'5, p. 910, c. 112); and,

The establishment and regulation of *hospitals for small-pox*, &c. (V. C. 1873, c. 84, § 6, &c.)

It should have been observed in connection with the *constitution of county courts*, that in case any judge of a county court is unable or fails to attend any regular term of his court, or part of it; or if, from death or other cause, there be no judge of such county, any other county judge may hold the court for the whole or part of a term. And where a vacancy exists it is the duty of the clerk to notify the governor, who is authorized to designate any county judge to hold the regular terms until the vacancy is filled, for which extra service such judge is to receive \$5 per day whilst actually engaged in holding court, and the mileage prescribed by law. And so also, a *lawyer*, with the consent of the parties, and of the judge, may preside in any cause. (V. C. 1873, c. 154, § 14, 15.)

The course of appeal from the county court is to the circuit court of the same county; in *civil cases* and cases of *police cognizance*, at the instance of *either party*, (except that the judgment of the county court, upon an *appeal from a justice of the peace*, is always final;) (V. C. 1873, c. 178, § 1, 2, 3, 12); and in *criminal cases* on behalf of the *accused only*, save in certain *revenue causes* where process of appeal is allowed to the Commonwealth also. (V. C. 1873, c. 203, § 3, 4 & seq.)

The terms of the county courts are held *monthly*, at the times prescribed by law, which, however, the court has power to change. Four or more of these terms, to be designated by the court, are set apart for the trial of *civil cases* in which juries are required, and thereafter, until otherwise ordered, all cases cognizable in such court in which *juries are required*, except criminal cases, and cases of forcible entry, &c., shall be tried *only at such terms as are so designated*. *All other matters or things* authorized by law to be done by or in such court may be done *at any term* thereof. (V. C. 1873, c. 154, § 3, 12.)

2^s. The Constitution and Jurisdiction of *Corporation Courts*; W. C.

1^h. The *Constitution of Corporation Courts*.

Formerly the constitution, as well as the jurisdiction, of the corporation courts were essentially the same as of the county courts. As the county courts were composed of the justices of the peace *of the county*, so the corporation courts consisted of the *mayor, recorder, and aldermen*, or of the aldermen (who were *ex-officio* justices of the peace,) of the corporation. (V. C. 1860, c. 157, § 2 to 13.) Beginning with the city of Richmond, however, in 1859-'60, (c. 169, § 3, 6; Id. c. 170, § 2,) the policy was inaugurated of creating two hustings or corporation courts: One composed, as before, of the mayor, recorder, and aldermen of the city, or any four of them, whose jurisdiction was limited principally to causes of *police cognizance and misdemeanors*, and the other consisting of a *single judge* possessed of all the jurisdiction previously exercised by the corporation courts; and besides that, having cognizance of *felonies*, and endowed with the same powers as the *circuit courts*, to award *injunctions*, writs of *habeas corpus*, *mandamus*, and *prohibition*. (V. C. 1860, c. 157, § 2; Id. c. 158, § 43 & seq.)

The policy thus set on foot was soon extended to other cities, and by the Constitution of 1869, (Art. VI, § 14,) was made applicable to *every city* or town in the State containing a population of over 5,000. The judge of these corporation or city courts, who is denominated a "*city judge*," is elected on the *joint vote* of the two houses of the General Assembly, and is required to hold a corporation or hustings court of the city as often, and as many days *in each month*, as may be prescribed by law, "with similar jurisdiction which may be given by law to the circuit courts." He is commissioned by the governor; is to hold office for *six years*, and until his successor is qualified; is to receive such salary and allowance as may be determined by law, the amount of which shall *not be diminished* during his term of office; and he may be removed by the *concurrent vote* of both houses of the General Assembly, a majority of all the members *elected*, to each house, concurring in the vote. (Va. Const. 1869, Art. VI, § 14, 22, 23, 25; V. C. 1873, c. 154, § 38.)

It is further provided by the Constitution, (Art. VI, § 14,) that in cities or towns containing 30,000 inhabitants, "*there may be elected an additional judge*, to hold courts of *probate and record*, separate and apart from the corporation or hustings court, and to perform such other duties as shall be prescribed by law;" a provision applicable, in fact, to no city in the commonwealth

but Richmond, as to which such a court has been created under the name of "the *Chancery court* of the city of Richmond," and made, as the Constitution provides, "a court of *probate and record*." The statute which created it clothes it, with respect to the city of Richmond, with the exclusive jurisdiction, which had been previously vested in the circuit and corporation courts, concerning the probate of wills, appointment, and removal of fiduciaries and settlement of their accounts, the docketing of judgments, the registry of deeds and other papers required to be recorded, and exclusive jurisdiction of all suits and proceedings *in chancery* cognizable by law in any circuit court in the commonwealth; the court and the judges having respectively, the same jurisdiction, powers, and duties, as circuit courts and judges, in respect to injunctions, sales, appointment of receivers, &c., according to V. C. 1873, c. 175, (V. C. 1873, c. 155, § 5, 6.) The judge of the court is to have like qualifications, and to be elected in the same manner, and for the same term, and to be removed in the same way, as the judges of the circuit courts. (V. C. 1873, c. 155, § 5.)

In giving effect to the constitutional provision for the organization and jurisdiction of the city and corporation courts generally, it is declared by sundry statutes that there shall be a court *in each town or city* in the State containing a population of 5,000, to be called the "*corporation court*" and to be held by a judge with like qualifications, and elected in the same manner, as the judges of the county court. (V. C. 1873, c. 154, § 34.)

The terms of the corporation courts are *monthly*, and they are to be held at such times each month as may be prescribed, but subject to be changed by the respective judges. (V. C. 1873, c. 154, § 35, 36.) The compensation is also prescribed by law, varying with the size of the city, from \$700 in Winchester, Fredericksburg, Staunton, and Danville, to \$2,300 in Richmond. It is directed to be paid out of the treasury of the corporations respectively; and in Richmond, Petersburg, and Norfolk, the corporations are authorized to increase the emoluments of their several judges by an amount not exceeding \$1,000 *per annum*, which they may also *reduce at pleasure*, but not so as to take effect until *after the expiration of the term of the judge then in office*; a provision which, without the last qualification, would be destructive to the independence of the judges, and violative of the spirit, if not the letter, of the express pro-

hibition of the constitution,—that the salaries of judges shall *not be diminished* during their term of office. (V. C. 1873, c. 154, § 41; Va. Const. 1869, Art. VI, § 22; Acts 1875-'6, p. 42, c. 50.)

Provision is also made by law for the case that a judge of a corporation court may be unable or may fail to attend a regular term of his court, or be prevented from sitting during the whole term; or be so situated with respect to any cause pending in his court, as in his opinion to make it improper for him to try it, in which cases any other judge of a corporation court may hold court for him during the whole term, or any part of it. (V. C. 1873, c. 154, § 40; Acts 1876-'7, p. 4, c. 3)

Any city judge whose salary does not exceed \$1,000, is allowed to practise law in any court of the commonwealth *other than his own*. (V. C. 1873, c. 154, § 42.)

2^a. The *Jurisdiction* of the Corporation Courts.

The jurisdiction of the corporation courts was formerly, as we have seen, precisely assimilated to that of the county courts. (V. C. 1860, c. 157, § 3, 4, 16.) At present, however, a very marked difference exists. The jurisdiction of the city courts of the city of Richmond is peculiar, and may be seen V. C. 1873, c. 154, § 22 & seq. The present jurisdiction of the other city or "*corporation courts*" of the State is *civil and criminal*, and also of matters of *police and economy*; that is, as it is prescribed *by statute*, (V. C. 1873, c. 154, § 38); but the *constitution* (Art. VI, § 14), seems to limit the jurisdiction so that it shall be similar to that given by law *to the circuit courts*! Without undertaking to reconcile the discrepancy, the *statutory limits* of their cognizance will be stated under the several heads just indicated, namely: (1), The *civil cognizance* of the corporation courts; (2), Their *criminal cognizance*; and (3), Their *police cognizance*;

W. C.

1¹. The *Civil Cognizance* of the Corporation Courts.

The constitution, as we have seen, creates the corporation courts "with similar jurisdiction [to that] which may be given by law to the circuit courts;" and the statutes describe their jurisdiction as being, within their respective limits, the same as that of the circuit courts; and also as embracing all other cases which were cognizable by the former hustings courts of the respective cities and towns as they existed on the 26th of January, 1870 (when the present constitution took effect); also the same jurisdiction as county courts over

all offences committed within their limits, and such other jurisdiction as may be conferred upon them by law; but not so as to apply to the courts of the city of Richmond, which are governed by statutory provisions (V. C. 1873, c. 154, § 21, 22 & seq; Id. c. 155, § 4, 5 & seq.) peculiar to themselves. (V. C. 1873, c. 154, § 38; Id. § 4 to 6.)

The civil jurisdiction conferred by these general terms is very extensive. It includes all cases *at law and in equity* where a single justice of the peace *has not cognizance*; all motions and other matters made cognizable therein by statute; all matters of probate and administration, of appointment of curators, committees of lunatics and guardians, and auditing the accounts of any such fiduciaries; granting of writs of *habeas corpus, mandamus, certiorari, and prohibition*; and appeals from single justices, wherever such appeals are allowed. (V. C. 1860, c. 157, § 16, 17; Id. c. 158, § 5; Acts 1866-'7, p. 945, § 118, § 3, (amending Code, c. clvii, § 16, 17); V. C. 1873, c. 154, § 4, 5, 38; Id. c. 155, § 2; Id. c. 147, § 15, 16 & seq.)

The considerations, therefore, already stated, which determine whether a single justice has cognizance, (*Ante* p. 204, & seq.) will suffice to ascertain the jurisdiction of the corporation courts, as to causes *at law and in equity*; for if in such cases a single justice has not cognizance, those courts have. The proceedings of a corporation court, as also those of a county court, are required to conform as nearly as may be to the practice of circuit courts in like cases, except where it is otherwise provided by law.

And here may be mentioned certain provisions borrowed substantially from English statutes, (43 Eliz. c. 6, § 2; 21 Jac. c. 16; 22 & 23 Car. II, c. 9, § 136; and 3 & 4 Vict. c. 24, § 2,) which are designed to discourage frivolous and vexatious suits, and also to prevent the more expensive procedure in a court of record, where the summary and cheaper cognizance of a justice of the peace is available. See 3 Bl. Com. 400 & n (19). Our statute discriminates between actions arising *ex contractu*, founded on *contract*, and actions *ex delicto*, growing out of *tort*, the provision being as follows:

In any personal action, *not on contract*, if a verdict be found for the plaintiff for less damages than \$10, he shall not recover in respect to such verdict *any costs*, unless the court enter of record that the object of the action was to *try a right*, besides the mere

right to recover damages for the trespass or grievance in respect of which the action was brought, or that the trespass or grievance was *wilful or malicious*. (V. C. 1873, c. 181, § 6.) Hence, if in an action for *tort* (say for *assault and battery*) the jury find for the plaintiff "six cents damages *and the costs*," so much of the finding as relates to the costs is surplusage, and judgment can be rendered only *for the six cents damages*, without any costs. (Bills v. Harris, 2 Va. Cas. 26.)

In any personal action *on contract*, wherein it is ascertained that less is due to the plaintiff than \$20, exclusive of interest, judgment shall be given *for the defendant*, unless the court enter of record that the matter in controversy was of greater value than \$20, exclusive of interest, in which case it may give judgment for the plaintiff for what is ascertained to be due him, *with or without costs*, as to it may seem right. (V. C. 1878, c. 181, § 7.)

As the law formerly was, the policy in this latter class of cases (cases of *contract*) was somewhat less rigorous. Thus, if the action were debt on a bond with *collateral condition*, (Newell v. Wood, 1 Munf. 556,) or for breach of contract *to do a collateral thing*, where the damages were *altogether uncertain*, supposing in case of the *bond* the penalty exceeds the amount limited for the court's jurisdiction, (Pendred's Adm'r's v. Pendred, 2 Va. Cas. 93,) or if the amount were reduced below the jurisdiction, *not by payments*, (Maitland v. McDearman, 1 Va. Cas. 131; Larowe v. Harding's Adm'r, 2 Va. Cas. 203,) but by *set-offs* (Ferguson v. Highlay, 2 Va. Cas. 255; Maitland v. McDearman, 1 Va. Cas. 131,) the plaintiff *had a right* to judgment *with costs*, without any appeal to the *discretion of the court*. And even where the amount was reduced *by payments* below the jurisdiction, or the amount was otherwise ascertained to be such as to prevent the cognizance of the court, the judgment was only *arrested*, not given *for the defendant*, which latter difference, however, is of little or no consequence. And it will be observed, that whilst in the case supposed as the law formerly was, judgment was *necessarily arrested*, according to the present statute, the court *in its discretion* may still give judgment for the plaintiff, with or without costs. The court, in the exercise of the discretion committed to it, governs itself in general by the same rules as formerly, although no longer imperatively bound thereby. That is, in actions on bonds with *collateral condition*, where the

penalty exceeds \$20; in actions on *collateral contracts*; and where the amount is reduced to \$20 or less by *set-offs*, and *not by payments*, the court will generally deem it right to render judgment with costs; and, on the other hand, where the original demand, by any fair estimate, could not have been supposed by the plaintiff to exceed \$20, exclusive of interest, or has been reduced to \$20 or less by *payments*, the court will, for the most part, give judgment *for the defendant*, which generally carries the costs in his favor.

But for the provisions of these statutes, *full costs* must have been awarded the plaintiff, wherever he proved any *cause of action, however trifling*. (V. C. 1873, c. 181, § 8; 2 Tuck. Com. 325-'6.)

The course of appeal from the corporation courts is to the *supreme court of appeals*. (V. C. 1873, c. 178, § 12). But no appeal lies from any judgment of a corporation or county court which is rendered on an appeal from a *judgment of a justice*; nor in respect to a judgment, decree, or order of a corporation court, where the controversy is for a matter *less in value or amount* than \$500, exclusive of costs, unless there be drawn in question a freehold, or franchise, or the title or bounds of land, or some matter *not merely pecuniary*. (V. C. 1873, c. 178, § 3.) And in *criminal cases*, it must be remembered, that no writ of error is allowed to the *Commonwealth*, save in a few cases where the offence immediately *concerns the revenue*. (V. C. 1873, c. 203, § 3.)

2^d. The *Criminal Cognizance* of the Corporation Courts.

The criminal cognizance of the corporation courts embraces crimes of every description, whether *felonies or misdemeanors*, and such criminal jurisdiction is *exclusive*, (V. C. 1873, c. 154, § 38, 4, 5); the course of appeal being, as in a civil cause, to the court of appeals. (V. C. 1873, c. 203, § 3.)

3^d. The *Police Cognizance* of the Corporation Courts.

The police cognizance of the corporation courts is the same as that of the county courts, (*Ante*, p. 217-'18), including amongst others, such as relate to—

Public Roads, Landings and Bridges. (V. C. 1873, c. 52, § 18, &c.);

Public Ferries. (V. C. 1873, c. 64, § 4, 12, &c.);

Mills. (V. C. 1873, c. 63, § 1, &c.);

Apprentices. (V. C. 1873, c. 122, § 1, &c., 12);

Paupers and Vagrants. (V. C. 1873, c. 47, § 53, 55);

Bastardy. (V. C. 1873, c. 121, § 1, &c.; Acts 1874-'5, p. 94, c. 112.)

Hospitals for Small-Pox, &c. (V. C. 1873, c. 84, § 6, &c.);

3^d. The *History, Constitution and Jurisdiction of the Circuit Courts*; W. C.

1st. The *History of the Circuit Courts*.

From the foundation of the commonwealth, on the 29th day of June, 1776, down to 1831, the administration of the jurisdictions of law and equity was *wholly separate* in Virginia, except in the county and corporation courts, the tribunals with that exception being *perfectly distinct*, as they are in England. In the county and corporation courts, whilst those courts were at once courts of law and courts of equity, yet the two jurisdictions were by no means blended, nor in any wise confounded. The same justices would decline, as composing a *court of common law*, a jurisdiction which they would assert as constituting a *court of equity*. But in the superior courts, the two jurisdictions were lodged in the hands of *different judges*, sitting at different times and places.

At first, in imitation of the English system, there existed but one superior court of chancery in the State, which held its sessions in Richmond, and was known as the *high court of chancery*. The sole chancellor was *George Wythe*, a man illustrious for his virtue and abilities, whose fame has been rendered less conspicuous only by the fact that he was surrounded by contemporaries whose public services were still more resplendent than his own. It could be no common man of whom Patrick Henry would say, "Shall I light up my feeble taper before the brightness of his noon-tide sun? It were to compare the dull dew-drop of the morning to the intrinsic beauties of the diamond!"

In 1802, the commonwealth was divided into *three districts*, and a chancery court provided for each, to sit respectively at Richmond, Williamsburg, and Staunton, and for the Williamsburg district, the first chancellor was *William Wirt*, then a young man of nine and twenty, who, during several years' practice in the county of Albemarle, and two in Richmond, had raised high expectations of professional eminence, which his future career did not disappoint.

Subsequently, four chancellors were created for the whole State, two for the territory east, and two for that west of the Blue Ridge, who held in their respective districts as many in the aggregate as *nine* chancery courts, namely, at Richmond, Williamsburg, Norfolk, Fredericksburg, Lynchburg, Wytheville, Staunton, Win-

chester, and Clarksburg, and during the latter period of the system, at Lewisburg. This system continued until 1831, when it yielded to that which has ever since been in force.

The nature of the proceedings in the courts of *common law* always required that, in respect to them, justice, to use a current phrase of that time, "should be brought *more nearly to every man's door*;" and *district courts of law* were therefore instituted at an early period, whose jurisdiction embraced several counties each; the courts being held at some central and convenient place for each district. Thus, Richmond, Winchester, Petersburg, Staunton, Charlottesville, Fredericksburg, Williamsburg, New London, (a now decayed hamlet some miles west of Lynchburg), and the Sweet Springs, were respectively the seats of nine of these courts. It was at New London that Patrick Henry achieved some of the most memorable triumphs of his career as an advocate.

This arrangement was, in 1809, superseded by "*superior courts of law*," held by a single judge twice a year, in every county and corporation; and in 1831, that again was followed substantially by the present organization, which commits common law and equity jurisdiction to the same judge, just as had been long practised in the county and corporation courts, keeping the jurisdictions as distinct as if they were administered by different judges; the "*order-books*," that is, the books of the minutes of the proceedings being *separate and distinct*, and not the same, as in the case of the county and corporation courts. These courts were required to be held twice a year, in every county and corporation, and were denominated "*circuit superior courts of law and chancery*."

In 1851, *the name*, but not the organization nor the jurisdiction of these courts, was changed, and they were styled "*circuit courts*," the designation which they have ever since borne.

2^d. The Constitution of the *Circuit Courts* in Virginia.

By the provisions of the Constitution of 1869, (Art. VI, § 9, 10, 22, 23), the State is divided into sixteen judicial circuits (which may be re-arranged or increased or diminished in number by the General Assembly, when the public interests require it.) Accordingly, two new circuits, the *seventeenth* and *eighteenth*, respectively, have been created. (Acts, 1874-'5, p. 173, c. 175, and p. 272, c. 229.) For each circuit, a judge is chosen by the *joint-vote* of the two houses of the General Assembly, for a term of *eight years*, and until his successor is qualified.

He is commissioned by the governor, receives such salary and allowances as may be determined by law, *the amount of which is not to be diminished during his term of office*, and may be removed from office by a concurrent vote of both houses of the General Assembly, a majority of all the members *elected to each house* concurring in such vote, and the cause of removal being entered on the journal of each house.

In order to be eligible as a circuit-judge one must, when chosen, have held a judicial station in the United States, or have practised law in this or some other State for *five years*. An incumbent of the office is disabled to hold any other office or public trust during his continuance in office, and must reside, during his term, in the circuit of which he is judge. (Va. Const. 1869, Art. VI, § 5, 11, 24.)

The constitution requires that a circuit court shall be held *at least twice a year*, by the judge of each circuit, in every county and corporation thereof wherein a circuit court is established; but judges may hold the courts of their respective circuits alternately, and the judge of one circuit may hold court in any other. (Va. Const. 1869, Art. VI, § 12); and by statute (upon the alteration of the jurisdiction of the *county courts*), *three terms* are appointed to be held every year in *each county*, besides such *special terms* as the dispatch of business may require. (V. C. 1873, c. 155, § 14, 15.) And although the jurisdiction of crimes has been restored to the county courts (Acts 1874-'5, c. 271), yet no change appears to have been made in the number of terms of the circuit courts.

The student is desired to note the provisions designed respectively to secure due *responsibility* and due *independence* in the circuit judges, namely: due *responsibility* by the liability *to be removed* by the concurrent vote of the two houses of Assembly; and due *independence*, by the prohibition to *diminish* their emolument.

3^d. The Jurisdiction of the Circuit Courts in Virginia.

The jurisdiction of the circuit courts is very various. Not only does it embrace causes as well *in equity* as *at law*, but it is *civil* and *criminal*, *original* and *appellate*; W. C.

1st. The Original Jurisdiction of the Circuit Courts; W. C.

1st. The Original Civil Jurisdiction of the Circuit Courts.

This jurisdiction is not prescribed by the constitution (Acts VI, § 1); but is left to be regulated *by law*. As by law established, it is identical with that of the cor-

poration courts already set forth, except only in respect to matters of *police and economy*. It extends to all cases *at law and in equity* where a single justice has not cognizance; to *motions* and *other matters* made cognizable therein by statute; to matters of *probate and administration*, appointment of curators, committees of lunatics and guardians, and the auditing of the accounts of such fiduciaries; to the granting of *writs of habeas corpus, mandamus, certiorari, and prohibition*; and to appeals from a single justice, where the case involves the *constitutionality or validity of the by-law of a corporation*. And the courts possess also exclusive original jurisdiction for the trial of all cases of *contested elections*, which may be cognizable by any court. (V. C. 1873, c. 155, § 2; Id. c. 154, § 7; Id. c. 153, § 1; Id. c. 118, § 23; Id. c. 126, § 4; Id. c. 126, § 1, 4, 8, 10, 16, 18, 20, 28, 30 & seq.)

2¹. *Criminal Jurisdiction of Circuit Courts in Virginia.*

The circuit courts have no cognizance to try misdemeanors, nor any felonies but *arson*, and such offences for which one *may be punished with death*, the policy having been again revived of committing the criminal jurisdiction of the commonwealth within corporations, to the city courts exclusively, and within the counties exclusively to the county courts, with the exceptions just indicated. (Va. Const, 1869, Art. VI, § 14; V. C. 1873, c. 155, § 2; Id. c. 154, § 8; Acts, 1874-'5, p. 364, c. 271.)

2^b. *The Appellate Jurisdiction of the Circuit Courts in Virginia; W. C.*

1¹. *Appellate Jurisdiction of the Circuit Courts in Civil causes, and Causes of Police, &c.*

The circuit courts have appellate jurisdiction from the *county courts in all civil causes*, whatever the amount in controversy, save only in case of judgment rendered by the county court on an appeal from the judgment of a justice. The judgment of the county court in that case is final. (V. C. 1873, c. 178, § 2, 3.) Also from justices of the peace where the case involves the *constitutionality* or the *validity of the by-law of a corporation*. (V. C. 1873, c. 147, § 16.)

Where one thinks himself aggrieved by an *order* of a county or corporation court, in a controversy concerning the probate of a will or the appointment or qualification of a personal representative, guardian, curator, or committee, or concerning a mill, roadway, ferry, or landing, he may, during the term at which such order is made, *appeal therefrom of right*, on giv-

ing bond to satisfy the order in case it should be affirmed. From the county court, the appeal is to the *circuit court*, which may *examine witnesses* upon the hearing of the appeal. From the corporation court, the appeal is to the court of appeals, which, in *no case*, can *hear parol testimony*. (V. C. 1873, c. 178, § 1, 3, 12, 22.)

In all other cases the appellate process can be had only *at the discretion of the appellate court*, which appellate process, if the case be *in chancery*, is an *appeal*; if not in chancery, a *writ of error* or *superse-deas*. And it must be applied for within *two years* after the final judgment, decree, or order of which the party complains. (V. C. 1873, c. 778, § 2, 3.)

The student will readily apprehend that there must be a certain degree of *finality* about every judgment, decree, or order, which is thus taken up to be reviewed in an appellate court. Accordingly, the following rules are prescribed, viz :

Appellate process may be *applied for*,—

(1), In case of "*an order*" in a controversy "concerning the probate of a will, or the appointment or qualification of a personal representative, guardian, curator, or committee, or concerning a mill, landing, roadway, or ferry;" or

(2), In "*any case in chancery*, wherein there is a decree or order dissolving an injunction, or requiring money to be paid, or the possession or title of property to be changed, or adjudicating to principles of a cause;" or

(3), In "*any civil case* wherein there is a *final judgment, decree, or order*." (V. C. 1873, c. 178, § 2.)

2¹. Appellate Jurisdiction of the Circuit Court in *Criminal Cases*.

A *writ of error* lies in a criminal case (that being the appellate process *exclusively* used in criminal cases) to a county court, from the circuit court having jurisdiction over such county, *for the accused* in any case, and *for the Commonwealth* also, if the case be for the violation of a law *relating to the revenue*. (V. C. 1873, c. 203, § 3.)

4¹. The *Constitution and Jurisdiction of the Supreme Court of Appeals* in Virginia; W. C.

1st. The *Constitution of the Supreme Court of Appeals*.

The supreme court of appeals consists of *five judges*, any three of whom may hold a court; save only, that in order to declare any law null and void by reason of its repugnance to the Federal constitution, or to the con-

stitution of the State, the assent of a *majority of the judges elected to the court is required!* (Va. Const. 1869, Art. VI, § 2.)

The judges are chosen by the *joint vote* of the two houses of the General Assembly, and shall hold their office *for twelve years*, and until their successors are qualified. They are commissioned by the governor; when chosen they must have held a judicial station in the United States, or have practised law in this or some other State for *five years*; are to receive such salaries and allowances as may be determined by law, the amount of which is *not to be diminished* during their term of office; and may be removed from office by a *concurrent vote* of both houses of the General Assembly, a majority of all the members *elected to each house* concurring in such vote, and the cause of removal being entered on the journal of each house, and the judge having notice thereof, with a copy of the charges, at least twenty days before either house shall act thereon; a provision which applies also to the circuit, county and corporation judges. (Va. Const. 1869, Art. VI, § 5, 22, 23, 25.)

The court of appeals, by the constitution, is to hold its sessions at two or more places in the State, to be *fixed by law*. (Va. Const. 1869, Art. VI, § 7); and by law, *four places* have been designated for holding the court, namely: Richmond, Wytheville, Staunton, and Winchester. (V. C. 1873, c. 156, § 6 & seq.)

The court elects its own officers, and appoints one of its members to be *president of the court*. (V. C. 1873, c. 156, § 1, Va. Const. 1869, Art. VI, § 6.)

The student will not fail to observe that the devices to secure at once a *due responsibility* in the judges and a *proper independence*, are the same as have been already repeatedly stated in respect to the judges of the inferior courts. There is also another provision applicable to the circuit judges as well as to these, which ought before to have been mentioned, the tendency of it being to assist in securing both independence and responsibility, namely: the provision "that judges of the *supreme court of appeals* and *judges of the circuit courts* shall not hold *any other office or public trust* during their continuance in office." (Va. Const. 1869, Art. VI, § 24.)

The constitution anticipates that a *special court of appeals* may be necessary in two contingencies, and provides, of course by law, that in those cases it *may be formed*. The two contingencies are, (1), That a majority of the judges of the supreme court of appeals may be

so situated as to make it improper for them to sit on the hearing of a cause; and (2), That the causes upon the docket cannot be otherwise disposed of *with convenient dispatch*. (Va. Const. 1869, Art. VI, § 3.) And accordingly, the legislature has provided for the organization of such *special court of appeals* in both cases, as follows, viz.:

(1), Where a *majority* of the judges of the supreme court of appeals are so situated as to make it improper for them to sit on the hearing of any cause.

The court may have summoned from among the judges of the *circuit courts* as many as, with the judges of the supreme court of appeals not disqualified, will make the number *five*, who shall together form and hold a *special court of appeals* to hear and determine such cases, the decision being certified, and carried into execution, as if made by the supreme court of appeals. (V. C. 1873, c. 156, § 14, 16.)

(2), Where the causes upon the docket of the supreme court of appeals cannot be otherwise disposed of *with convenient dispatch*.

The court of appeals shall designate annually *three judges of the circuit courts*, to constitute a special court of appeals, for the trial of such causes, civil and criminal, as the court of appeals cannot dispose of with convenient dispatch; and shall certify to it, not exceeding *fifty causes* at a time. The special court may sit, if business require it, for ninety days, and not longer in any one year. The original act providing for the formation of this special court was limited to continue for *two years only* (ending February 28, 1874), unless the supreme court of appeals should enter of record, within that time, that its existence was no longer necessary. (V. C. 1873, c. 156, § 20, 21 & seq, 28.) And that time having expired without the act being renewed, *this* special court no longer exists.

2^d. The Jurisdiction of the Supreme Court of Appeals of Virginia.

The jurisdiction of the supreme court of appeals is *exclusively appellate*, (save only in case of writs of *habeas corpus*, *mandamus*, and *prohibition*, when it may exercise original jurisdiction, if the Legislature shall choose to confer it, as it has not done,) and is both *civil and criminal*, applying to the judgments, decrees, and orders of the circuit and corporation courts. It has no jurisdiction in *civil cases* where the matter in controversy, exclusive of costs, is less in *value or amount* than \$500, except in controversies concerning the title or boundaries of land, the probate of a will, the appointment or quali-

fication of a personal representative, guardian, committee, or curator, or concerning a mill, road-way, ferry, or landing, or of the right of a corporation or of a county to levy tolls or taxes, and except in cases of *habeas corpus*, *mandamus* and *prohibition*, or the *constitutionality of a law*, with the remarkable *proviso* (betraying a total ignorance of the functions of the judiciary in respect to the constitution), that the assent of a *majority of the judges elected to the court* shall be required in order to declare any law null and void, by reason of its repugnance to the Federal constitution or to the constitution of this State. (Va. Const. 1869, Art. VI, § 2; V. C. 1873, c. 156, § 3, 4, 5.)

A practice having unfortunately prevailed of simply *affirming or reversing* the judgment or decree of the court below, without assigning any reasons, the Constitution of 1851, imitated by that of 1869, (Art. VI, § 4,) provides that, "where a judgment or decree is reversed or affirmed by the supreme court of appeals, the reasons therefor shall be stated in writing, and preserved with the record of the case."

The appellate process employed in the court of appeals is identical with that used in the circuit court, and so also the circumstances of *finality* are the same as in respect to that court. It will suffice, therefore, to refer to the explanation given, *Ante*, p.

5^c. The Constitution and Jurisdiction of the *Federal Courts*.

To expound the constitution and jurisdiction of the Federal courts will oblige us to advert to, (1), The cases cognizable in those courts, and the considerations which induced the allotment of the jurisdiction; and (2), The several Federal courts, and their jurisdiction respectively; W. C.

1^a. The Cases cognizable in the Federal Courts, and the considerations which induced the allotment of the jurisdiction; W. C.

1^b. Cases Cognizable in the *Federal Courts*.

The judicial power of the United States is by the constitution (Art. III, § 1,) extended to all cases in *law and equity*, arising, under the constitution, the laws of the United States, and treaties made, or which shall be made under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; but not so as to extend to any suit in law and equity, commenced or prosecuted *against one of the United States, by a*

citizen of another State, or by *citizens or subjects* of any foreign State ; to controversies between citizens of different States ; between citizens of the same State claiming lands under grants of different States ; and between a State, or the citizens thereof, and foreign States, citizens or subjects.

Some of these causes, it will be observed, seem to be referred to the Federal judiciary, by reason of the *nature of the cause*, and others because of the *character of the parties concerned* ; so that the judicial power of the United States may be conveniently distributed under *two great classes* accordingly ;

W. C.

1^l. Causes Cognizable in the Federal Courts, by reason of the *character of the cause* ; W. C.

1^k. Cases in *Law and Equity*, arising under the Constitution, Laws, and Treaties of the United States.

The phrase "*cases in law and equity*," recognizes the two systems of jurisprudence, *legal and equitable*, so prominent in the common law, establishes the distinction between them, and perpetuates for the courts of the United States, the discrimination between suits in which *legal rights* are to be ascertained and determined, and those in which *equitable rights* alone are recognized, and equitable remedies administered. (1 Abb. U. S. Pract. 195 ; Fenn v. Holmes, 21 How. 481 ; Bennett v. Butterworth, 11 Id. 669 ; Persons v. Bedford, 3 Pet. 438 ; Parish v. Ellis, 16 Id. 451.)

A case in *law or equity* may be said to arise "under the constitution, laws, and treaties of the United States," whenever its correct decision depends on the *construction of either*. The right of the one party or the other must depend on the constitution, or on some United States law or treaty. And there is no need that the case should *turn wholly* upon either of those instruments. If *one of the questions* forming an ingredient in the cause be of that character, the case is within the judicial power of the United States courts, although other questions of law or fact may be also involved. (1 Abb. U. S. Pract. 199, &c. ; Cohens v. Virginia, 6 Wheat. 379 ; Owings v. Norwood, 5 Cr. 344 ; Osborne v. Bank of U. S. 9 Wheat. 738.)

Cases arising under the *constitution*, are especially such cases as depend *immediately* on the construction of that instrument, and notably (though not exclusively) those cases where individual rights are violated by *State legislation* in conflict with the constitu-

tion; *e. g.*, such as impairs the obligation of contracts, or is *ex post facto*, &c. (Fletcher v. Peck, 6 Cr. 87; Cook v. Moffett, 5 How. 295, 308; Cummings v. Missouri, 4 Wal. 277; Crim. Synops. 8; Hepburn v. Griswold, 8 Wal. 603; Legal Tender Cases, 12 Wal. 457; Gunn v. Barry, 15 Wal. 610.)

Cases arising under the "*laws*" of the United States, are cases where the rights of either, or both, of the parties are to be determined by the construction of the statutes of the United States, either arising directly under them, or growing out of the conflict of State laws with such statutes, in which case the State laws (supposing the United States statute to be constitutional), are void; for the constitution of the United States, and the *laws and treaties* made in pursuance thereof, are "*the supreme law of the land*," anything in any State law to the contrary notwithstanding. (U. S. Const. Art. VI, § 2.)

Cases arising under "*treaties*" occur most frequently from a conflict between State legislation and the stipulations of treaties, when the treaty is to be regarded as *supreme*, and the *State law void*; but such cases may also occur from the fact that the rights of the parties depend on the construction or interpretation of treaties. (1 Abb. U. S. Pract. 203 & seq; U. S. v. The Peggy, 1 Cr. 103; Owings v. Norwood's lessee, 5 Cr. 348; Worcester v. State of Georgia, 6 Pet. 515; Wilson v. Wall, 6 Wal. 83.)

2*. Cases of Admiralty and Maritime Jurisdiction.

The supreme court of the United States, down to about 1847, had adopted and acted upon the idea that the phrase, "admiralty and maritime jurisdiction," was derived from the common law of England, and was to be interpreted as understood in that law; that is, as extending to the high seas only, or at most, not beyond the *ebb and flow of the tide*. No case, however, had involved the direct consideration of the question until Waring & als v. Clarke, 5 How. 454 & seq, (A. D. 1847), in which it was held that the constitution was rather to be deemed to have contemplated the admiralty and maritime jurisdiction as administered before the Revolution by the vice-admiralty courts of the colonies, and during the Revolution, by the admiralty courts of the States; and in that aspect, such jurisdiction, so far as *locality is concerned*, extends to all waters navigable for vessels *employed in commerce* (say of twenty tons burden, or upwards), where such waters *open a communication* with other States or countries, whether the waters be salt or

fresh, whether the tide ebbs and flows therein or not, and whether they lie in several States, or in one only. And this doctrine has since been matured, confirmed and applied in many cases. (N. J. St. Nav. Co. v. Merch. Bk. 6 How. 385; Genessee Chief v. Fitzhugh, 12 How. 451 & seq. (where C. J. Taney gives a clear and masterly exposition of the subject); St. Boat N. World v. King, 16 How. 469; Jackson v. The Magnolia, 20 How. 296; The Hine v. Trevor, 4 Wal. 561; The Moses Taylor, 4 Wal. 411; The Belfast, 7 Wal. 624; The Eagle, 8 Wal. 15; Ins. Co. v. Dunham, 11 Wal. 25-'6, &c.)

2^d. Causes Cognizable in the Federal Courts, by reason of the Character of the Parties; W. C.

1st. Causes which *affect Ambassadors*, other Public Ministers, and Consuls.

It is observable that the words of the constitution specify cases *affecting* ambassadors, &c., while in other instances they speak of controversies *between* specified parties. The contrast is supposed by some to be significant of a broader jurisdiction in the former case, so as to give the Federal courts jurisdiction not only where an ambassador, &c., *is a party*, but also wherever he is in *any manner affected*. (Marshall C. J. in Osborn v. Bank of United States, 9 Wheat. 854; 1 Abb. U. S. Pract. 205.) Yet it is settled that a public prosecution, in the name of the United States, charging an assault committed on the person of a public minister, is *not a case affecting a public minister* within this provision. (U. S. v. Ortega, 11 Wheat. 469.)

It is a familiar doctrine of international law, that a public minister is, in general, wholly independent of the jurisdiction and authority of the State where he resides. (Vat. Internat. Law, B. IV, § 92; Wheat. Internat. Law, 142-'3). There are some exceptions however, to this general doctrine. Thus, if the minister be a subject of the government to which he is accredited, and is received only on condition that he shall not be exempt from its jurisdiction; or if with consent of his own sovereign, he accepts a post under that government; or if in the country where he is, he acquires lands not needful for his ambassadorial functions; or if he carries on a trade therein; in all these cases, and in the particulars indicated, he enjoys *no immunity*; but is subject to the jurisdiction of the courts of the country, (Vat. Internat. Law, B. IV, c. viii, § 112 to 115). The terms of the con-

stitution, therefore, when the public minister is *defendant*, must relate to these excepted cases.

2^d. Causes to which the *United States shall be a Party*.

Where the jurisdiction depends on the *character or residence of parties*, it is in general, the party named as such *on the record* who is regarded, and not one who is *merely interested* in the controversy; and when a *joint interest* is prosecuted, each individual named as a party plaintiff must be entitled to invoke the jurisdiction of the court. And these principles are supposed to apply as well where the United States is a party, as in other cases. (1 Abb. U. S. Pract. 207.)

The United States have the same civil remedies, *as plaintiffs*, that individuals have. But they are not subject to the process of the courts, *as defendants*, as individuals are. It is a fundamental maxim that a sovereign can never be made amenable even in its own judicial tribunals, unless its consent to respond and subject itself to adjudication has been expressly declared.

Hence, no judgment can be given against the United States *for costs*, unless their consent has been so manifested, nor *a fortiori* can any court, save by such consent, command the withdrawal of money from the treasury of the United States, to pay the claim of an individual. (U. States v. McLemore, 4 Hen. 286; U. States v. Guthrie, 17 How. 284.)

But although, prior to the institution of the "Court of claims," all demands against the United States which the accounting officers of the government rejected, were referable to Congress alone, yet it has always been held that, if a party be sued by the United States, he may, by way of defence, set up any proper *counter-demand or set-off* against the government, and that he is not precluded from so doing by the fact that his claim has previously been rejected by the accounting officer; for the *judicial power* of the government is by the constitution vested *in the courts*, and cannot be finally exercised, nor indeed exercised at all, by an executive department. (1 Abb. U. S. Pract. 208; U. States v. Ringold, 8 Pet. 150; U. States v. Robertson, 9 Pet. 319; U. States v. Wilkins, 6 Wheat. 135; Gratiot v. U. States, 15 Pet. 336; U. States v. Bank of Metropolis, 15 Pet. 377; U. States v. Buchanan, 8 How. 83; Ware v. U. States, 4 Wal. 617.)

The judicial power of the United States is now ex-

tended to claims against itself, through the "*court of claims*," whose decisions are subject to revision by the supreme court of the United States; and the amounts decreed are to be paid out of the treasury of the United States, for which appropriations are annually made. (1 Abb. U. S. Pract. 208, 244, 274; 15 U. S. States, 77; Rev. Stats. U. S. 132, § 707, 708.)

3^k. Causes between *two or more States*.

The cases between two or more States which have hitherto occurred, have for the most part been cases of *disputed boundary*; but many other cases may come within the purview of the provision. Thus, in *Kentucky v. Dennison, Gov'r, &c.*, 24 How. 66, 95, the object of the suit on the part of the State of Kentucky was to obtain from the supreme court of the United States a writ of *mandamus*, to be addressed to the governor of Ohio, in order to compel him to deliver up a fugitive from justice from Kentucky, upon the demand of the executive of the latter State, pursuant to United States Constitution, Art. IV, § ii, 2: in which case, however, the supreme court declined to grant the writ, on the ground that the "*duty*" enjoined by the constitution of the United States on the governor of Ohio was, as to the Federal authorities, merely a *moral obligation*, which neither the judiciary, nor any other department of the United States government, could enforce.

The principal cases wherein this very august power of determining questions arising *between States*, in many respects *sovereign*, (a power which is exercised by the concession of the States themselves, contained in the Federal Constitution,) may be enumerated as follows, namely:

New Jersey v. New York, 5 Pet. 284;
Rhode Island v. Massachusetts, 12 Pet. 657;
Florida v. Georgia, 7 How. 478;
Missouri v. Iowa, 7 How. 660;
Alabama v. Georgia, 23 How. 565;
Kentucky v. Dennison, 24 How. 66, 98;
Virginia v. West Virginia, 11 Wal. 39, 53.

4^k. Causes between *a State and Citizens of another State*.

Within four years after the adoption of the Constitution of the United States, (viz: in February, 1793,) the supreme court held that the provision in question admitted an *individual* to bring a *State* to the bar of the supreme court as a *defendant*, (Chis-

holm v. Georgia, 2 Dal. 419,) a determination which, though warranted and required by the terms employed, ("controversies *between* a State and citizen of another State,") occasioned such disquietude through the whole sisterhood of States, as to give rise immediately to Amendment XI of Constitution, declaring that "The judicial power of the United States shall not be construed to extend to any suit, in law or equity, commenced or prosecuted against *one of the United States by citizens of another State, or by citizens or subjects of any foreign State.*" The only cases under this head, therefore, are cases where a State is a *plaintiff against an individual*. And in order that the jurisdiction may be maintained, it must appear that the State claims, not an *abstract right*, but a *direct interest* in the controversy, and invokes the aid of the Federal judiciary to redress its wrongs, and save it from irreparable injury. It must not be a party merely, in virtue of its *sovereignty*, and come into the courts of the United States to *protect the rights of its citizens*. (Pennsylvania v. Wheeling Bridge Co. & al, 13 How. 559.)

5^k. Causes between *Citizens of different States*.

A very considerable part of the business of the circuit courts of the United States, consists of causes where the jurisdiction depends on the *citizenship* of one or both of the parties under this clause; the precise import of which is, therefore, of great importance. Let us consider, (1), What causes (*controversies*) are involved; (2), Who are *citizens* within the meaning of the provision; and (3), What is comprehended under the word *States*. (1 Abb. U. S. Pract. 210);
W. C.

1^l. What *Controversies* are Involved.

There seems no reason to doubt that the word *controversies* embraces *civil suits only*, because it is used in reference to judicial proceedings between *party and party*; but who are to be deemed *parties to a controversy*, whether those who are *interested* in the subject-matter, or those only who are to appear as *parties on the record*, has not yet been fully elucidated by adjudged cases; although in general, those persons alone are regarded as parties whose names *must appear on the record*.

2^l. Who are *Citizens* within the meaning of this clause.

In order to be a *citizen* within the meaning of this clause, one must be *domiciled* within the State;

that is, must live there for the time being, without any present purpose of removing therefrom. Merely having one's present home in any State is *prima facie* evidence that he is domiciled there; but the presumption is repelled by proof that his sojourn was for a *temporary purpose*, with a present intention to withdraw at a future time. The intention of the party, upon which the question hinges, may be made to appear *by his acts*, and by his *contemporaneous*, and not collusive *declarations*; attaching, of course, more weight to the acts than to the declarations. (Prentiss v. Barton, 1 Brock. 390, 394 & n (3); Shelton v. Tiffin, 6 How. 163; Rabaud v. D'Wolf, 1 Pet. 476.)

And it must be observed, that citizenship within the District of Columbia, or within a territory of the United States, does not confer jurisdiction upon the Federal courts, neither the district nor the territory being a *State* within the meaning of the constitution, and of the judiciary act. (Hepburn & Dundas v. Ellzey, 2 Cr. 445; Corp. of N. Orl. v. Winter, 1 Wheat. 91; Barney v. Baltimore, 6 Wal. 287.)

The averment of citizenship is *prima facie* evidence of the fact, and can be controverted only upon a plea in abatement denying it, which the defendant must sustain by sufficient evidence. (D'Wolfe v. Rabaud, 1 Pet. 493; Sheppard v. Graves, 14 How. 510; Jones v. League, 18 How. 81.)

Nor does it affect either the fact of one's being a citizen of a State, nor the consequences in respect to the jurisdiction of the Federal courts, that he removed thither exclusively for the purpose of acquiring the right to sue in those courts; or rather it would be more correct to say, that that fact does not obviate a *proved citizenship*, or its consequences; for if it appear that such was the object of the removal, it might be very potent to show that the residence was not of the required *permanent character*. (Jones v. League, 18 How. 81; Kirkman v. Hamilton, 6 Pet. 20.)

If a suit in the Federal courts grounded on citizenship, be once properly commenced, a subsequent change of domicile will not divest the jurisdiction, which depends on the state of things at the time the *suit was brought*. Nor does the jurisdiction depend on *length of residence*. The moment one

settles himself in a new State, with the *purpose to make it his domicile*, it becomes such, and the jurisdiction of the Federal courts immediately attaches. (U. States v. Myers, 2 Brock. 516; Morgan's Heirs v. Morgan, 2 Wheat. 290; Mullen v. Torrance, 9 Wheat. 537; Dunn v. Clarke, 8 Pet. 3; Clarke v. Mathewson, 12 Pet. 171.)

To enable the courts of the United States to exercise jurisdiction in controversies between *citizens of different States*, where there are *several plaintiffs* or *several defendants*, each of the persons must be competent to sue or to be sued. The local residence of *all the parties on each side* must be such as to bring the case within the clause. Hence, the court cannot take jurisdiction under this clause, where one of the plaintiffs is not, although another may be, a citizen of a different State from the defendant, or where one of the defendants resides in the same State as the plaintiff. Even *consent* in such case cannot give jurisdiction. But if the parties who thus obstruct the jurisdiction are not indispensable parties, and a decree without prejudice to their rights can be made, the court should retain jurisdiction, and dismiss the suit as to them. (1 Abb. U. S. Pract. 211 & seq.; Desty's Federal Procedure, 52; Emory v. Greenbrough, 3 Dal. 369; Bingham v. Cabot, 3 Dal. 382; Strawbridge v. Curtiss & al, 3 Cr. 267; Gassies v. Ballon, 6 Pet. 762; Coal Co. v. Blatchford, 11 Wal. 174; Horn v. Lockhart, 17 Wal. 579; Barney v. Baltimore, 6 Wal. 280.)

An *assignee of a note, &c.*, cannot sue in the United States courts, unless suit can be brought there, had there been *no assignment*; a provision of the judiciary act, (1 Bright. Dig. 127-'8; Rev. Stats. U. S., § 629; Desty's Fed. Proceed. 52), that limits the jurisdiction, which by the constitution *might have been conferred* on the United States courts, and for that reason, its constitutionality has been doubted; but the objection was overruled, and the validity of the statute established, in Sheldon v. Sill, 8 How. 448.

It is established by the later decisions of the supreme court, that a *corporation* is to be deemed a citizen of the *State which creates it*, wherever the corporation, or members of the corporation, may reside. (Louisville, O. & O. R. R. Co. v. Letson, 2 How. 497; Marshall v. Balt. & O. R. R. Co., 16

How. 329; *Ohio & M. R. R. Co. v. Wheeler*, 1 Black. 297; *Ins. Co. v. Francis*, 11 Wal. 216; *R. R. Co. v. Harris*, 12 Wal. 81-'2; *RI'way Co. v. Whitton*, 13 Wal. 283.) And where several corporations are created by different States, but with the same name and franchises, and with charters identical in terms, in order to operate in conjunction, as in case of continuing railroad tracks extending through several States, they are really *distinct corporations*, exercising their faculties within distinct limits, and cannot *unite* as plaintiff in a suit in a United States court against a citizen of *either of the States* which chartered them. (*Ohio & Miss. R. R. Co. v. Wheeler*, 1 Black. 286, 297-'8.)

In the case of *trustees, executors and administrators*, and other representative parties, the same rules hold, as where the parties are concerned in interest, *in their own right*. They sue, indeed, in a representative capacity, but the right to sue, if it exists at all, belongs to them *personally* as citizens, or as aliens, as the case may be, and the jurisdiction of the United States courts depends on the citizenship of the executor, trustee, &c., who is a party *on the record*, and not on the citizenship of the deceased. Thus, a Maryland executor of a deceased citizen of Virginia may bring all the suits necessary to collect the decedent's assets, (where the amount is sufficient), in the Federal courts. (1 Abb. U. S. Pract. 24; *Coal Co. v. Blatchford*, 11 Wal. 172; *Rice v. Houston*, 13 Wal. 66.)

3¹. What is comprehended under the word *States* in the clause in Question.

The word *States* does not include, either here or elsewhere in the constitution, anything but the organized communities which are members of the Union, and, therefore, does not embrace the *territories*, nor the district of Columbia; so that the jurisdiction of the court is not applicable where one of the necessary parties is a citizen of that district, or of a territory. (1 Abb. U. S. Pract. 215; *Hepburn v. Ellsey*, 2 Cr. 446; *N. Orleans v. Winter*, 1 Wheat. 91.)

6². Causes between Citizens of the same State claiming lands *under the Grants of Different States*.

Cases of grants made by different States are within the Federal jurisdiction, notwithstanding one of the States, at the time of the *first grant*, was *part of the other*. (*Town of Pawlet v. Clark*, 9 Cr. 292.)

And as it is the *grant* which passes the legal title, if the controversy is founded upon the conflicting grants of different States, the Federal courts have jurisdiction, whatever may have been the prior *equitable* title of the parties. (Colson v. Lewis, 2 Wheat. 377.)

7^a. Causes between a *State or the Citizens thereof*, and *Foreign States, Citizens or Subjects*.

The principles as to the definition of citizenship, which have been already mentioned, apply to ascertain what persons are within this provision; and it is believed that a *foreign corporation* is to be deemed a foreign citizen or subject, within its meaning (Soc. for Prop. Gospel v. Town of New Haven, 8 Wheat. 464.) But an Indian tribe or nation within the United States is not a "*foreign State*" within the meaning of this clause (Cherokee Nation v. Georgia, 5 Pet. 1.)

If the party to the record be an alien, he is within the jurisdiction of the Federal courts, whether he sue in his own right or as trustee (Chapedeleine v. Dechenaux, 4 Cr. 306.) And as, on the other hand, where the *real party in interest* is an alien, *for whose use the suit is brought*, although the *nominal party* be a citizen of the same State as the defendant, yet the United States courts have jurisdiction. (Brown & al v. Strode, 5 Cr. 303.)

2^b. The Considerations which influenced the Framers of the Federal Constitution to refer certain causes to the Federal Judiciary.

See Federalist, No. LXXX; 2 Stor. Const. § 1641; Chisholm v. Georgia, 2 Dal. 419; W. C.

1^a. That a cause involves the *Construction and Effect* of the Constitution, Laws, or Treaties of the United States.

The constitution of the United States, and the laws and treaties made in pursuance thereof, are declared by the constitution itself to be the *supreme law of the land*, anything in any State law or constitution to the contrary notwithstanding (U. S. Const. Art. VI, § 1); and it is, therefore, of paramount importance that they should receive an *uniform exposition*, which would be impossible if their final interpretation were submitted to the State tribunals.

Moreover, every government which aspires to command the respect of its subjects, or of the world, must have the means, through its judiciary, of giving *peaceably, full and complete effect* to its policy and admin-

istration, without being in any wise dependent therefor on any agency outside of itself, which would generally disappoint, and sometimes *purposely thwart*, its designs.

- 2¹. That a Cause belongs to the class of *Admiralty and Maritime Jurisdiction*.

Causes of admiralty and maritime jurisdiction belong to the sea, and for the most part are not within the local jurisdiction of any particular State. They, moreover, are liable to concern foreigners as well as citizens, and embrace *questions of prize*, &c., and other topics of belligerency which involve the peace of the country, its relations with other powers, and the conduct of war, with all of which subjects the Federal government is charged. The Federal judiciary, therefore, should surely have cognizance of all such causes, seeing that the Federal government is responsible for the satisfactoriness with which they are adjudicated.

- 3¹. That a Cause concerns the *Ministers and other Representatives of Foreign Powers*.

It is important, for the sake of national peace, to give the promptest and fullest satisfaction in administering justice in causes which so nearly affect the dignity and independence of foreign sovereigns; and if cases of this kind were submitted to the State courts, the tranquility of the whole might be jeopardized by the improper action of a judiciary *belonging to a part*.

Moreover, the questions involved in the causes which concern public ministers are often complex, and wide-reaching, and are more likely to receive an able discussion and a wise solution from the Federal judges, recruited as they are from a far more comprehensive field of capacity and learning, than from the State courts.

- 4¹. That a Cause concerns the *Relations of the States with one another, or with the United States*; or that it is *between the Citizens of different States*.

In none of these cases can the States individually afford an *impartial tribunal*. This class of causes, moreover, involves the *peace of the confederacy*, of which the Federal government is the *custodian*, and it is not fitting that the general peace, for which the government of the Union is responsible, should be put in jeopardy by the acts or omissions of a part.

Moreover, where the States cannot supply an impartial tribunal, and especially where the controversy is *between States*, it is a felicitous arrangement, which the

confederacy makes practicable, to refer such causes to the *Federal courts*, which are at once impartial, are entitled to respect for their integrity and learning, and are backed by an executive power too strong to admit a thought of resistance.

5¹. That a Cause concerns *Relations with Foreign States or Subjects*.

The Federal government *exclusively* is charged with the conduct of intercourse with foreign powers, and must answer to them for any injustice done to them or their subjects within the United States, in the administration of justice; and for that reason, as well as because the administration is more likely to be *impartial, able, and satisfactory* in the Federal courts, this class of causes is submitted to the cognizance of the Federal judiciary.

2². The Several *Federal Courts* and their *Jurisdiction*, respectively.

The tribunals to administer the judicial power of the United States, except the supreme court, are not designated by the constitution. It is merely declared by that instrument (Art. III, § i,) that the judicial power of the United States shall be vested in *one supreme court*, and in *such inferior courts as Congress may from time to time ordain and establish*. Thus, whilst only the *organization* of the supreme court is left to the discretion of Congress, that body is charged with the *creation* as well as the *organization* of the inferior tribunals.

The *distribution* of the judicial power is also, for the most part, committed to Congress, although in a few prominent instances, where the *public peace of the country is concerned*, that is, in cases affecting *ambassadors, other public ministers, and consuls*, and those in which a *State is a party*, the supreme court is by the *constitution* clothed with *original jurisdiction*, whilst in all other cases its jurisdiction is *appellate only*; nor can Congress make it *original* in any other cases than those named. (U. S. Const. Art. III, § ii, 2; *Marbury v. Madison*, 1 Cr. 137; *Metzger's Case*, 5 How. 176, 191-'2; *In re Kaine*, 14 Hw. 119.)

In the exercise of its discretion, Congress has created two tribunals inferior to the supreme court, namely: *district courts*, (1 Bright. Dig. 228 & seq; Rev. Stats. U. S. p. 88, &c., § 530 & seq), and *circuit courts*, (1 Bright. Dig. 124 & seq; 2 Do. 74, &c., Rev. Stats. U. S. p. 106, &c., § 605 & seq.)

The judges of all the courts of the United States are appointed by the *president*, by and with the advice and

consent of the *Senate* (U. S. Const. Art. II, § ii, 2), and hold their offices *during good behavior*. They are at stated times to receive for their services, a compensation, which *shall not be diminished* during their continuance in office, (U. S. Const. Art. III, § i.) Hence, courts in which the judges hold their offices for a *specific number of years* are not constitutional courts, in which the judicial powers conferred by the *constitution* can be deposited. (*Amer. Ins. Co. v. Canter*, 1 Pet. 511, 546.) Nor can a tax be imposed on a *Federal judge's salary*; not by a *State government*, because such a power might obstruct the administration of the Federal government, (*Com'th v. Mann*, 5 W. & S. (Pa.) 415; *McCulloch v. Maryland*, 4 Wheat. 316; *Osborne & al v. Bk. of U. States*, 9 Wheat. 733; *Weston v. City of Charleston*, 2 Pet. 466; *R. R. Co. v. Peniston*, 18 Wal. 30 to 32, 38); nor *by the Congress*, because that would *diminish* his compensation.

So also, it seems to be a clear inference from the constitution, that if a court were created by Congress, and judges appointed, and Congress should subsequently think fit to abolish the court, the judges would *still be entitled to their salaries*, although their functions were at an end; for if it were otherwise, as it is in the power of Congress to abolish all the inferior courts of the United States, the independence of the judges of those courts would be prostrated at the feet of the legislature. See 1 Tuck. Bl. App'x, 350; 3 Do. App'x, 22 & seq; 2 Stor. Const. § 1633 & seq.

The constitutional provisions for a tenure of office by the judges *during good behavior*, and forbidding their compensation to be *diminished* during their continuance in office, are designed to secure their *independence*; a quality which cannot be too highly appreciated, and in respect to which it has been shrewdly observed, that it is more vital to the liberty and rights of the citizens of a republic, with its tumults of popular excitement and passion, than even in a monarchy. (2 Stor. Const. § 16, 27; & n. 3; § 1628.) The testimony of the really great men of this country to the value of *independence* in the judiciary has been very strong and consentaneous. "I have always thought, from my earliest youth," says *C. J. Marshall*, in the Virginia Constitutional Convention of 1829-'30, "that the greatest scourge an angry heaven ever inflicted upon an ungrateful and sinning people was an ignorant, a corrupt, or a dependent judiciary." (Debs. Va. Com. 619.) And the authors of the "*Federalist*" observe, that "the standard of good behavior for the

continuance of the judicial magistracy is certainly one of the most valuable of the modern improvements in the practice of governments. In a monarchy, it is an excellent barrier to the despotism of the prince; in a republic, it is a no less excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws." (Fed., No. LXXVIII, (p. 355-'6).) The same work speaks thus of the other expedient to secure independence in the judiciary: "Next to permanency in office, nothing can contribute more to the *independence of the judges than a fixed provision for their support.* * * * * * In the general course of human nature, *a power over a man's subsistence is a power over his will.* And we can never hope to see realized in practice the complete separation of the judicial from the legislative power, in any system which leaves the former dependent for pecuniary resource on the occasional grants of the latter." (Fed., No. LXXIX, (p. 361.)

The provision intended to secure a due degree of *responsibility* in the judges of the United States, is that which, for neglect or mal-administration, subjects them to *impeachment* by the House of Representatives, to be tried by the Senate; conviction being followed by removal from office, and by disqualification to hold any post of honor, trust or profit under the United States. (U. S. Const. Art. I, § ii, 5, 6, § iii.) And to this is added a solemn *oath of office*. (1 Bright. Dig. 448; Rev Stats. U. S. p. 313-'14, § 1756, 1758.)

The several courts were organized substantially as at present, by an act of Congress passed at the *first session* of the *first Congress*, 1789, which has ever since been known as the *judiciary act*. (1 U. S. Stats. 73; 1 Stor. Ed. 53; 1 Bright. Dig. 124, &c., 228, &c., 256, 257, &c., 301-'2, 861, &c., 448; Rev. Stats. U. S. p. 92, &c., § 551 & seq; Id. p. 106, &c., § 605 & seq; Id. 124, &c., § 673 & seq.)

The judicial system of the United States, as contained in the constitution, contemplated *no territorial courts*. When, therefore, it became necessary to devise a judiciary for the territories, it was done *by statute* exclusively; and as the temporary character of the territorial governments makes a permanent tenure of judicial office impracticable, the acts organizing territories usually fix a short term, for the most part *four years*, and until their successors are appointed and qualified. (1 Bright. Dig.

452, 684, 695 ; Rev. Stats. U. S. p. 331, § 1864 & seq ; Desty's Fed. Procedure, 9 & seq.)

Commissioners of the United States, who were at first designed merely to *administer oaths* and affirmations required by law, have had their powers enlarged so as to enable them to take the depositions of witnesses in civil cases, and to exercise all the powers that any *justice of the peace, or "other magistrate"* of any of the United States might exercise, in respect to offenders for any crime or offence *against the United States*, by arresting, imprisoning, or bailing the same, under the thirty-third section of the judiciary Act, and also to exercise certain powers in respect to seamen. They are appointed by the circuit courts of the United States. (1 Bright. Dig. 166-'7 ; Rev. Stats. U. S. p. 109, § 627 ; Id. p. 137, § 727 ; Id. p. 189, § 1014, &c. ; Desty's Fed. Procedure, 50, 113, 217.)

Before proceeding to enumerate the several Federal courts, and to describe their organization and jurisdiction respectively, it is expedient to set forth in order certain cases and proceedings wherein the jurisdiction vested in the courts of the United States is *exclusive of the courts of the several States*. Those cases and proceedings are as follows:

First. Of all crimes and offences cognizable under the authority of the United States.

See Rev. Stats. U. S. § 711 ; Desty's Fed. Proc. 106 ; *Martin v. Hunter's Lessee*, 1 Wheat. 329 ; *Houston v. Moore*, 5 Wheat. 24, 29 ; *Prigg v. Pennsylvania*, 16 Pet. 658 ; *U. S. v. Lathrop*, 17 Johns. (N. Y.) 4 ; *Com'th v. Feely*, 1 Va. Cas. 1 ; *Jackson v. Rose*, Id. 34.

Second. Of all suits for penalties and forfeitures incurred under the laws of the United States.

See Rev. Stats. U. S. § 711 ; Dest. Fed. Proc. 106 ; same cases as under the preceding head.

Third. Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common law remedy, where the common law is competent to give it.

See Rev. Stats. U. S. § 711 ; Dest. Fed. Proc. 106 ; *The Hine v. Trevor*, 4 Wal. 555 ; *The Belfast*, 7 Wal. 624.

Fourth. Of all seizures under the laws of the United States, on land or on waters not within the admiralty and maritime jurisdiction.

See Rev. Stats. U. S. § 711 ; Dest. Fed. Proc. 106 ; *Slocum v. Mayberry*, 2 Wheat. 1 ; *Gelston v. Hoyt*, 3 Wheat. 246.

Fifth. Of all cases arising under the patent-right and copyright laws of the United States.

See Rev. Stats. U. S. § 711; Dest. Fed. Proced. 107.

Sixth. Of all matters and proceedings in bankruptcy.

See Rev. Stats. U. S. § 711; Dest. Fed. Proced. 107.

Seventh. Of all controversies of a civil nature, where a State is a party, except between a State and its citizens, or between a State and citizens of other States, or aliens.

See Rev. Stats. U. S. § 711; Dest. Fed. Proced. 107; *Georgia v. Brailsford*, 2 Dal. 402; *Chisholm v. Georgia*, 2 Dal. 419; *Hollingsworth v. Virginia*, 3 Dal. 378; *New York v. Connecticut*, 4 Dal. 1; *Governor of Georgia v. Madrazo*, 1 Pet. 110; *New Jersey v. New York*, 5 Pet. 284; *Rhode Island v. Massachusetts*, 12 Pet. 657; *Florida v. Georgia*, 11 How. 293.

There was until recently an *eighth* class also, namely: suits or proceedings against ambassadors, or other public ministers, or their domestics, &c., or against consuls or vice-consuls. (Rev. Stats. U. S. § 711); but it was stricken out by act of Congress of February 18, 1875. (Dest. Fed. Proced. 107, n.)

We are now to note the constitution and jurisdiction of each of the United States courts, namely: (1), Of the district courts; (2), Of the circuit courts; and (3), Of the supreme court;

W. C.

1^b. District Courts of the United States; W. C.

1^a. *Constitution of the District Courts* of the United States.

The whole territory of the United States, so far as it is covered by organized States, is divided into a number of convenient districts, (down to March, 1873, about fifty-six,) not departing at any time from State lines; but many of the States being divided into two, and some into *three districts*, namely, Alabama, Tennessee, and New York. On the other hand, Massachusetts, Maine, Connecticut, New Jersey, Delaware, Maryland, Kentucky, West Virginia, Louisiana, and some others, constitute each one district. (1 Abb. U. S. Pract. 284; Conkling's Jurisd. U. S. Courts, 100; 1 Bright. Dig. 228 & seq; Rev. Stats. U. S. p. 88, &c., § 530 & seq; Desty's Fed. Proceed. 10.)

In each district is a district judge, who is required to *reside within his district*, and to hold therein annually two or more terms, (with a few exceptions,) at *such places* as may be designated by law, and also such *special terms* as the business may require. In case of the judge's disability to hold his court, the

circuit judge for that district may exercise his functions, or the circuit justice; or if there be no circuit judge or circuit justice, the chief-justice may appoint the district judge of any other district to act. And so, also, where the accumulation or urgency of judicial business shall require, the circuit judge, or if there be none, the chief-justice, may appoint any other district judge to assist, by holding a separate court in the district in order to meet the emergency. (1 Br. Dig. 228; Rev. Stats. U. S. p. 92, &c., § 551, 589, 593, & seq; Desty's Fed. Proced. 17, 29 & seq, 36, 37, 39, & seq.)

The district court being a court of *common law and equity*, as well as of *admiralty* and *bankruptcy-cognizance*, the persons admitted to conduct the business of suitors therein are styled, as we have seen, attornies, solicitors, proctors, advocates, and counsellors, according to the character in which they officiate. The qualifications and rules for admission have been previously described. (*Ante*, p. 169; Desty's Fed. Proced. 245.)

2^d. Jurisdiction of the District Courts of the United States.

The jurisdiction of the district courts is of course *wholly original*, being the lowest court in the series, and is both *criminal and civil*.

W. C.

1st. *Criminal* Jurisdiction of the District Courts of the United States.

The district courts have concurrent jurisdiction with the circuit courts of the United States of all crimes and offences *not capital* which are committed against the United States, within their respective districts, or on the high seas. And this jurisdiction is, at least in general, *exclusive* of that of the State courts. (1 Bright. Dig. 230-'31; Rev. Stats. U. S. p. 94, &c. § 563 & seq; 1 Abb. U. S. Pract. 288-'9; Crim. Synops. 209-'10; Desty's Fed. Procedure, 21; *Ex-parte*, Bollman, 4 Cr. 75; United States v. Hudson, 7 Cr. 32; United States v. Coolidge, 1 Wheat. 415; United States v. Bevans, 3 Wheat. 336; The Palmyra, 12 Wheat. 1.)

2nd. *Civil* Jurisdiction of the District Courts of the United States; W. C.

1st. Admiralty and Maritime Jurisdiction.

The jurisdiction of the district courts in admiralty and maritime causes is exclusive, both of the circuit courts of the United States and of the

State courts, and embraces the following four particulars, namely, (1), Maritime contracts; (2), Maritime torts; (3), Prize-causes; and (4), Seizures upon *navigable waters*, under the navigation and revenue laws of the United States. (1 Abb. U. S. Pract. 289; Conkl. Jurisd. 134; Bac. Abr. Courts of U. States, II, § 2, (p. 815); 1 Bright. Dig. 230-'31; Rev. Stats. U. S. p. 94, &c., § 563; Desty's Fed. Procedure, 22, 23.)

W. C.

1st. Maritime Contracts, wheresoever made.

The district courts' cognizance of maritime contracts depends, not *on the place where they are made*, nor on the locality where *they are to be performed*, but upon the *subject-matter* of the contract. If that be *maritime*, the contract is maritime. Hence the contracts which, being maritime, are cognizable in admiralty, may be enumerated as follows:

(1), *Charter parties, and contracts of affreightment*, on waters navigable for vessels used in commerce.

See *Morewood v. Enequist*, 23 How. 493; *N. J. Nav. Co. v. Merchants Bank*, 6 How. 344; *The Moses Taylor*, 4 Wal. 411, 431; *The Eddy*, 5 Wal. 481; *The Maggie Hammond*, 9 Wal. 435; *The Belfast*, 7 Wal. 625, 644.

(2), *Contracts for transportation of passengers* on navigable waters, &c.

See *The Moses Taylor*, 4 Wal. 411, 431.

(3), *Maritime liens* arising either out of contract (*e. g.* of affreightment), or out of *tort*, (*e. g.* from collision).

See *The Belfast*, 7 Wal. 635, 642 & seq; *Leon v. Galceran*, 11 Wal. 187-'8.

(4), *Contracts with ship-carpenters, material-men, &c.*, for repairs, materials and outfit of a ship, belonging to a *foreign nation* or to *another State*.

See *The St. Iago de Cuba*, 9 Wheat. 407, 416; *The Aurora*, 1 Wheat. 195; *The Gov. Smith*, 4 Wheat. 438; *Peyroux v. Howard*, 7 Pet. 324, 341; *N. J. Nav. Co. v. Merchants Bank*, 6 How. 344, 390-'91.

(5), *Contracts of pilotage, and of salvage*, express or implied.

See *Hobart v. Droган*, 10 Pet. 108; *The Sybil*, 4 Wheat. 98.

(6), *Bottomry contracts*, whether under seal or

not, for money lent to ships in foreign parts, to enable them to complete the voyage.

See *Menetone v. Gibbons*, 3 T. R. 269; *The Aurora*, 1 Wheat. 96; *Ins. Co. v. Dunham*, 11 Wal. 27.

(7), Contracts of *Marine Insurance*; that is, for risks on navigable waters.

See *Marine Ins. Co. v. Dunham*, 11 Wal. 29, 35.

(8), Wages of *mariners and subordinate officers*, and of *master*, if the credit in the latter case were given *to the ship*, and *not to the owners* merely.

See *The Thos. Jefferson*, 10 Wheat. 428; *Leon v. Galceran*, 11 Wal. 187-'8.

(9), *Surveys of vessels* damaged by the perils of the sea.

See *Janney v. Col. Ins. Co.* 10 Wheat. 412, 415, 418.

Since the case of the *Genessee Chief*, 12 How. 443, the enabling Act of Congress of 1845, which sought to extend the jurisdiction of the admiralty to the *great lakes*, and their *connecting waters*, (1 Bright. Dig. 25; Rev. Stats. U. S. p. 94, § 563, (cl. 8) has, in consequence of that decision, which ascertained the admiralty jurisdiction contemplated by the constitution, and by Act of 1789, § 9, conferred on the district courts (1 Bright. Dig. 54-'5), become inoperative, and ineffectual *as a grant of jurisdiction*, and it cannot be construed *to restrict* what it was avowedly designed to *extend*. The sole effect of the Act of 1845 is to give the parties a *trial by jury*, if either desire it. The case of the *Genessee chief* determined that the admiralty jurisdiction extends to all *public navigable waters*, whether influenced by the tide or not. (*The Eagle*, 8 Wal. 20, 24, &c.)

The *admiralty jurisdiction* is in these instances vested exclusively in the district courts of the United States; but that means only that proceedings *in rem* must be in the admiralty court, nor is it competent to a State legislature to confer jurisdiction to proceed in such cases *in rem*. But a State court, or a United States circuit court (in a proper case), may enforce any common law remedy *in personam*. (*The Moses Taylor*. 4 Wal. 411, 431; *The Belfast*, 7 Wal. 625, 643 & seq; *Leon v. Galceran*, 11 Wal. 187-'8; *The Lottawanna*, 21 Wal. 558.)

2nd. *Maritime Torts*, that is, Torts committed on

Waters navigable for Vessels employed in Commerce.

The *locality* where the tort was committed determines the jurisdiction. It must have been on *navigable waters* in order to come within the admiralty cognizance of the district courts, that is, on waters navigable for *craft employed in commerce*, and affording a communication with another State, or a foreign country; and that being so, it is immaterial whether the water be landlocked or open, salt or fresh, influenced by the tide or not. And the jurisdiction, so far as it is *in rem*, is exclusive; but any common law action, *in personam*, appropriate to the wrong, is maintainable in the State courts, or (in a proper case,) in the United States circuit courts, by express reservation of the ninth section of the judiciary act of 1789, or as the act itself expresses it, "Saving to suitors in all cases (of contract, tort, prize, &c.,) the right of a *common law remedy*, where the common law is competent to give it." (*Genessee Chief v. Fitzhugh*, 12 How. 448; *The Heine v. Trevor*, 4 Wal. 561; *Ins. Co. v. Dunham*, 11 Wal. 26; *St. Boat Co. v. Chase*, 16 Wal. 529, 532-'3, &c.; 1 Bright. Dig. 24-'5; Rev. Stat. U. S. p. 94, § 563 (cl. 8); 1 Abb. U. S. Pract. 291-'2; *Desty's Fed. Procedure*, 22, 23.)

3^m. Prize-Causes.

The ninth section of the judiciary act of 1789, which apportioned to the district courts the admiralty jurisdiction in *civil cases*, contemplated by the Federal constitution, declares that they shall have "exclusive original cognizance of all *civil causes of admiralty and maritime jurisdiction*, including all seizures under laws of impost, navigation or trade of the United States, where the seizures are made on waters which are navigable," &c. (1 Bright. Dig. 24-'5.) In determining what is comprehended under the designation, "*civil cases of admiralty and maritime jurisdiction*," reference must be had to the English system; and there we find the admiralty jurisdiction distributed between the *instance-court*, and the *prize-court*; the latter having cognizance of *prize-causes*, and the *instance-court* administering the jurisdiction in all other cases. To the *instance-court*, therefore, belong the cases of *contract* and of *tort*, already treated of, whilst captures and questions of prize

jure belli, belong to the *prize-court*. (Glass v. Sloop Betsy, 3 Dal. 12.)

By the law of nations, the cognizance of all captures, *jure belli*, or, as it is more familiarly phrased, of all questions of *prize* and their incidents, belongs *exclusively* to the courts of the *captor's country*. No neutral nation has any right to inquire into or decide upon the validity of such capture, even though it should concern property belonging to its own citizens or subjects, unless its own *sovereign or territorial rights* are violated; but the sole and exclusive jurisdiction belongs to the courts of the *capturing belligerent*, sitting in its own territory, or in that of an ally, and *not in that of a neutral*. And this jurisdiction, by the general usage of nations, is vested in courts of admiralty. (2 Stor. Const. § 1667; 12 Stats. U. S. 374; Desty's Fed. Proced. 22-'3.)

This prize jurisdiction is, in the United States, conferred on the district courts, as courts of admiralty, they possessing all the powers of a court of admiralty in civil cases, whether considered as an *instance-court* or a *prize-court*. The prize jurisdiction extends to *all captures* during war, in which *naval forces are engaged*. (1 Abb. U. S. Pract. 290-'91; Desty's Fed. Proced. 22, 23.)

The more recent prize causes are the following, viz:

The Prize cases, 2 Black. 635.
 The Slavers (Reindeer), 2 Wal. 384.
 The Andromeda, 2 Wal. 481.
 The Sally Magee, 3 Wal. 451.
 The Hart, 3 Wal. 551.
 The Bermuda, 3 Wal. 515.
 The Nassau, 4 Wal. 641.
 The Springbok, 5 Wal. 1.
 The Wren, 6 Wal. 582.
 The Georgia, 7 Wal. 32.
 The Siren, 7 Wal. 152.
 The Cotton Plant, 10 Wal. 577.
 The Siren, 13 Wal. 389.

4^m. Seizures upon *Navigable Waters*, under the Impost, Trade and Navigation Laws of the United States.

This subject of cognizance seems to be purely *statutory*; and to the statutes reference is made therefor. See 1 Abb. U. S. Pract. 291.

2^d. Jurisdiction of all seizures under the laws of the United States, *elsewhere than in navigable waters*;

and all suits for *penalties and forfeitures*, under the laws of the United States.

This is an *exclusive jurisdiction* in the district courts, with some special exceptions, which are made cognizable in the circuit courts. (1 Abb. U. S. Pract. 293; 1 Bright. Dig. 230-31; Rev. Stats. U. S. p. 94, § 568 (cl. 8), Desty's Fed. Procedure, 22, 23.)

- 3¹. Jurisdiction of Suits against Consuls and Vice-Consuls of Foreign Powers, except for capital offences.

This jurisdiction is not now *exclusive of the State courts*. (1 Abb. U. S. Pract. 293-4; Rev. Stats. U. S. p. 96, § 563 (cl. 17); Desty's Fed. Procedure, 25, 107 n. (a); Act Cong. 18 Feb. 1875.)

- 4¹. Jurisdiction of Suits by an Alien for "*a tort only in violation of the Law of Nations, or a Treaty of the United States.*"

This cognizance is *concurrent* with that of the State courts, and (in a proper case), with the United States circuit courts. (1 Bright. Dig. 231; 1 Abb. U. S. Pract. 293; Rev. Stat. U. S. p. 96, § 563 (cl. 16); Desty's Fed. Proced. 25.)

- 5¹. Jurisdiction of Suits at *Common Law*, where the United States Sue, or any officers thereof, under the *authority of any Act of Congress*.

Here also the jurisdiction is *concurrent* with that of the State courts, and (in a proper case,) with that of the United States circuit courts; and it is not, as formerly, limited to cases of \$100 in amount. (1 Bright. Dig. 231; 1 Abb. U. S. Pract. 293; Rev. Stats. U. S. p. 94, § 563, (cl. 4); Desty's Fed. Procedure, 21; Parsons v. Bedford, 3 Pet. 447; Duncan v. U. S. 7 Pet. 450.)

- 6¹. Jurisdiction in cases of *Bankruptcy*.

The *original* jurisdiction of bankruptcy causes is *exclusive* both of the United States circuit courts, and of the State courts. An appellate and supervisory jurisdiction in those cases, however, is vested in the United States circuit courts, and in the supreme court ultimately. (1 Abb. U. S. Pract. 294, 359-60; 14 U. S. Stats. 517, § 1, 2 & seq; 8, 9, 10; Rev. Stats. U. S. p. 96, § 563 (cl. 18); Desty's Fed. Proced. 25, 107.)

- 7¹. Jurisdiction of Suits and Actions by or against *National Banks* established within their respective Districts.

This jurisdiction is *concurrent* with that of the State courts, and of the United States circuit courts. (2 Bright. Dig. 64, § 57; 1 Abb. U. S. Pract. 294;

Rev. Stats. U. S. p. 95, § 563 (cl. 15); Desty's Fed. Proced. 24; Kennedy v. Gibson, 8 Wal. 506; Bank v. Kennedy, 17 Wal. 19; Bullard v. Bank, Wal. 589, Tiffany v. Nat. Bank, 18 Wal. 409; Tappen v. Merchants Nat. Bk. 19 Wal. 491; Cadle v. Baker, 20 Wal. 650; Nat. Bank v. Colby, 21 Wal. 609.)

- 8¹. Jurisdiction of Suits in Equity to enforce liens of United States on Distilleries, &c., for Taxes.

Here the jurisdiction is *concurrent* with that of the United States circuit courts, but *exclusive* of the State courts. (15 U. S. Stats. 167, 125, 128; 1 Abb. U. S. Pract. 294; Desty's Fed. Proced. 22, 106.)

- 9¹. Jurisdiction of Suits arising under the *Civil Rights Act*.

This jurisdiction is *concurrent* with that of the circuit courts of the United States, but *exclusive* of the State Courts. (1 Abb. U. S. Pract. 289; 14 U. S. Stats. 27, § 3; 16 Id. 144; 17 Id. 13; Rev. Stats. U. S. p. 95, § 563, (cl. 12); Desty's Fed. Proced. 24, 106.)

- 10¹. Jurisdiction of Causes of Action arising under the *postal laws* of the United States.

See Rev. Stats. U. S. § 563; Desty's Fed. Proced. 22.

- 11¹. Jurisdiction of Suits by the *assignee of any debenture* for draw-back of duties, issued under any law for the collection of duties, against the person to whom such debenture was originally granted, or against any endorser thereof, to recover the amount of such debenture.

See Rev. Stats. U. S. § 563; Desty's Fed. Proced. 23.

- 12¹. Jurisdiction of all suits authorized by law to be brought by any person for the recovery of damages on account of *any injury to his person or property*, or of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy to prevent one from accepting, holding, or discharging the duties of any office under the United States, &c., as mentioned in § 1980.

See Rev. Stats. U. S. § 563; Desty's Fed. Proced. 23-'4.

- 13¹. Jurisdiction of all suits at law or in equity, authorized by law to be brought by any person to redress the deprivation under color of any law, ordinance, regulation, custom, or usage of any State, of any right, privilege, or immunity secured by the constitution of the United States, or of any right

secured by any law of the United States to persons within the jurisdiction thereof.

See Rev. Stats. U.S. § 563; Desty's Fed. Proced. 24.

- 14¹. Jurisdiction of all suits *to recover possession of any office*, except that of elector of president or vice-president, representative or delegate in Congress, or member of a State Legislature, authorized by law to be brought, wherein it appears that the sole question touching the title to such office arises out of the denial of the right to vote to any citizen offering to vote, on account of race, color, or previous condition of servitude; *provided*, that such jurisdiction shall extend only so far as to determine the rights of the parties to such office, by reason of the denial of the right guaranteed by the constitution of the United States, and secured by any law to enforce the right of citizens of the United States to vote in all the States.

See Rev. Stats. U. S. § 563; Desty's Fed. Proced. 24; Slaughter House Cases, 16 Wal. 74; United States v. Reese, 2 Otto. 217 & seq; United States v. Cruikshank, 2 Otto. 542, 551 & seq.)

- 15¹. Jurisdiction of all proceedings by the writ of *quo warranto*, prosecuted by any district attorney, for the removal from office of any person holding office, except as a member of Congress, or of a State legislature, contrary to the provisions of Art. XIV, § 3, Amendments to Constitution of United States.

See Rev. Stats. U. S. § 563; Desty's Fed. Proced. 24.)

- 2^h. Circuit Courts of United States.

See 1 Bright. Dig. 124; 2 Do. 74; 1 Abb. U. S. Pract. 299; Rev. Stats. U. S. p. 109, &c., § 629 & seq; Id. p. 106, &c., § 605 & seq; Desty's Fed. Procedure, 44 & seq;)

W. C.

- 1¹. The Constitution of the Circuit Courts of United States.

The territory of the United States lying within the organized States, and exclusive of the *Territories*, is divided into *nine circuits*, for each of which a *circuit judge* is appointed by the president, with the concurrence of the Senate, having within his circuit, the same powers and jurisdiction as the justice of the supreme court allotted to that circuit. He is to reside in his circuit; and the circuit court may be held *by him*, or by the *district judge* of the district, or by the *justice of the supreme court* allotted to the circuit, each sitting alone, or by any two of the said judges sitting

together; the justice of the supreme court, when he is present, presiding. And such courts may be held at the *same time*, in the different districts of the same circuit, the judges sitting apart for the purpose, as the presiding judge shall direct. (16 U. S. Stats. 44-'5; 1 Abb. U. S. Pract. 299, 300, &c.; Rev. Stats. U. S. 107, § 609, &c.; Desty's Fed. Proced. 45-'6.)

The circuits are occasionally more or less changed in extent, and boundaries, and as one justice of the supreme court is allotted to each, the number corresponds to the number of justices of the supreme court. At present, the circuits are arranged as follows:

FIRST CIRCUIT: Maine, New Hampshire, Massachusetts, and Rhode Island.—Mr. Justice N. Clifford, of Maine.

SECOND CIRCUIT: New York, Vermont and Connecticut.—Mr. Justice Ward Hunt, of New York.

THIRD CIRCUIT: Pennsylvania, New Jersey, and Delaware.—Mr. Justice Wm. Strong, of Pennsylvania.

FOURTH CIRCUIT: Maryland, West Virginia, Virginia, North Carolina, and South Carolina.—Mr. Chief-Justice M. R. Waite, of Ohio.

FIFTH CIRCUIT: Georgia, Florida, Alabama, Mississippi, Louisiana, and Texas.—Mr. Justice J. P. Bradley, of New Jersey.

SIXTH CIRCUIT: Ohio, Michigan, Kentucky, and Tennessee.—Mr. Justice N. H. Swayne, of Ohio.

SEVENTH CIRCUIT: Indiana, Illinois, and Wisconsin.—Mr. Justice ———.

EIGHTH CIRCUIT: Minnesota, Iowa, Missouri, Kansas, Arkansas, and Nebraska.—Mr. Justice S. F. Miller, of Iowa.

NINTH CIRCUIT: California, Oregon, and Nevada.—Mr. Justice S. J. Field, of California.

In *each district* embraced in these circuits respectively, two circuit courts are held annually, by the judges already above designated (*supra*, p. 256-'7), namely: by the justice of the supreme court allotted to the circuit (as shown in the table above), the circuit judge of that circuit, or the district judge of the district, or by *any two of them*. (1 Bright. Dig. 124-'5; 16 U. S. Stats. 44, 45; Rev. Stats. U. S. p. 107, § 609, 610.) And it is the duty of each *supreme court judge* to attend at least one term of the circuit court in each district of his circuit, during every period of two years. (16 U. S. Stats. 45, § 4; Rev. Stats. U. S. p. 107, § 610.)

When the circuit court is held by *two judges*, and

they differ in opinion, either party may require the *point on which they differ* (not the whole case), to be certified into the supreme court for its decision. But upon appeal or writ of error from his own decision in the district court, the district judge has in the circuit court no voice, and the cause is determined exclusively by the circuit judge; and, of course, in such a case there can be no division of opinion, and consequently no demand to have the division certified, save when the circuit judge and associate justice of the supreme court sit together. (1 Bright. Dig. 260, § 8, 125, § 11; Rev. Stats. U. S. p. 117, § 651; U. S. v. Bailey, 9 Pet. 257; Adams v. Jones, 12 Pet. 207; White v. Tuck. Ibid. 238; Nesmith v. Sheldon, 6 How. 41; Webster v. Cooper, 10 How. 54; Dennistoun v. Stewart, 18 How. 565.) And as only the *precise questions* upon which the judges are opposed in opinion are certified, and are before the supreme court, the cause is not removed, and may, therefore, be proceeded with in the circuit court, so far as the non-adjudication of the question certified will permit. (Kennedy v. Georgia State Bank, 8 How. 611; Desty's Fed. Proced. 67, 68.)

The question contemplated by this provision is a *question of law*, and *not one of fact*. (Wilson v. Barnum, 8 How. 258; Dennistoun v. Stewart, 18 How. 565.) But it may arise *on the trial* (U. S. v. Bevans, 3 Wheat. 336); or on a *special verdict* (Somerville's Ex'ors v. Hamilton, 4 Wheat. 230); or on a motion in *arrest of judgment*. (U. States v. Kelly, 11 Wheat. 417.) But a division of opinion on a *motion for a new trial* cannot be certified under this section, because such a motion is addressed to the *discretion* of the court which heard the testimony, and that may make an impression not always to be communicated by a statement of it. (U. States v. Daniel, 6 Wheat. 542.) Indeed, notwithstanding the words of the act are general: "Whenever *any question* shall occur before a circuit court, upon which the opinion of the judges shall be opposed," the point shall be certified, &c., no question depending merely upon the *discretion of the court*, and to be disposed of according to that discretion, is embraced within its purview, such as motions for continuances, amendments, &c. (Davis v. Braden, 10 Pet. 289; Packer v. Nixon, 10 Pet. 410.)

Whatever two judges are together on the bench of the circuit court, if they are opposed in opinion, this

provision is applicable. Hence, there may be a certificate of division of opinion as well between the associate justice of the supreme court and the circuit judge, as between either of those judges and the district judge. (*Ins. Co. v. Dunham*, 11 Wal. 21-'2.)

When the district judge, sitting alone, holds the circuit court, as is expressly permitted by law, (16 U. S. Stats. 45), he exercises its *full powers*, with the exception of reviewing his own decisions made in the district court. (1 Abb. U. S. Pract. 301.)

Formerly, circuit courts were not held in certain remote districts, which it would have been inconvenient for the then circuit judge (one of the justices of the supreme court) to reach,—*e. g.*, the northern and middle districts of Alabama, western district of Georgia, northern district of Mississippi, western district of Virginia, now the State of West Virginia, &c.; and then the district courts of those districts were clothed with *circuit court powers*. (1 Bright. Dig. 126, § 14, & n (a); Rev. Stats. U. S. p. 97, § 571.) At present, the extension of the railroad system to almost every section of the country, and the appointment of special circuit judges, have gone far to do away with the necessity which dictated this arrangement, and few such districts remain; none others, indeed, except the western district of Arkansas, the northern district of Mississippi, the western district of South Carolina, and the district of West Virginia. (*Desty's Fed. Proced.* 27; Rev. Stats. U. S. § 571.)

The circuit courts, as courts of equity, are considered *always open* for the purpose of filing pleadings, issuing and returning process, and for interlocutory proceedings, (Abb. U. S. Pract. 301); and the presiding judge in the circuit courts may appoint *special sessions* for hearing causes in equity, cases in error or on appeal, issues in law, (*e. g. on demurrer*); motions in arrest of judgment; motions for a new trial; and all other motions, as to award execution, &c., and for any other business and proceedings in all causes pending in the circuit court, except trying any cause by jury. Such special sessions are to be held at the place where the stated sessions are held. (1 Abb. U. S. Pract. 202.)

2^d. The *Jurisdiction* of the Circuit Courts of the United States.

The jurisdiction of the United States circuit courts is both *civil* and *criminal*, and in both branches it is either *original* or *appellate*. Let us consider, (1), The

original jurisdiction, as it is either criminal or civil; and (2), The *appellate jurisdiction*, as it is criminal or civil:

W. C.

- 1^k. The *Original Jurisdiction* of the Circuit Courts of the United States.

See 1 Bright. Dig. 126; Rev. Stats. U. S. p. 109, &c., § 629; Bac. Abr. Courts of U. States, (B), I, § 2, (p. 807); 1 Abb. U. S. Pract. 304;

W. C.

- 1^l. *Original Criminal Jurisdiction* of the Circuit Courts.

The criminal jurisdiction of the United States circuit courts embraces (exclusively of the State courts) all offences cognizable by authority of the United States. If the offences be *capital*, the jurisdiction is exclusive of the district courts of the United States; if *not capital*, it is *concurrent* therewith. (1 Bright. Dig. 127; 1 Abb. U. S. Pract. 307; Rev. Stats. U. S. p. 94, § 563; 1 Whart. Crim. Law, § 163, &c.; Jackalow's Case, 1 Black, 484.)

It may happen that the same act is at once a violation of the law of a State, and of the United States, as for example, making or passing counterfeit coin, or counterfeit national bank or United States treasury notes. And the punishment provided by the United States statutes does not preclude the State courts from taking cognizance of the breach of State laws. (Fox v. Ohio, 5 How. 410; Moore v. Illinois, 14 How. 13; Hendrick's Case, 5 Leigh, 707; Jetts's Case, 18 Grat. 967; Synops. Crim. Law, 131-'2.)

- 2^l. *Original Civil Jurisdiction* of the Circuit Courts.

It must be observed, that the jurisdiction of the district and circuit courts of the United States, in all cases, and of the supreme court in respect to its appellate cognizance, (although its limits, which may not be exceeded, are determined by the constitution,) yet depends for its actual extent, not on the constitution alone, but on the acts of Congress, which organize and prescribe the powers of the courts. In point of fact there is much judicial power that might, by the constitution, have been bestowed by Congress on the courts, which has not been so bestowed, and which, therefore, is incapable of exercise by them. Nor can the inferior courts, (at least the district and circuit courts,) nor, for the most part, the supreme court, pretend to possess any power

which has not been conferred or regulated by some act of Congress. (*McIntire v. Wood*, 7 Cr. 506; *Kendall v. United States*, 12 Pet. 616; *Cary v. Curtis*, 3 How. 244.)

In order, therefore, to ascertain the original civil jurisdiction of the circuit courts, the judiciary Act of 1789, with the acts supplementary thereto, must be carefully examined. And upon such examination, it appears that Congress has not thought fit to confer, either upon the circuit or the district courts, or upon both of them together, a general jurisdiction over all cases arising under the constitution, laws, and treaties of the United States; but has selected only a few, comparatively, of such causes; whilst in cases where the cognizance depends upon the character of the parties, jurisdiction has been bestowed more liberally; but even in these, not without qualification.

The several instances of causes coming within the civil cognizance of the United States circuit courts may be classed under the three heads following, namely: (1), The general rule of the jurisdiction of the circuit courts; (2), The exceptional cases of such jurisdiction; and (3), Causes removed from the State courts into the circuit courts of the United States;

W. C.

1st. The General Rule of the Civil Jurisdiction of the Circuit Courts of the United States.

The circuit courts have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common law and in equity, where the matter in dispute, exclusive of costs, exceeds \$500, in the cases following, namely: (1), Where the United States are plaintiffs; (2), Where an alien is a party; and (3), Where the suit is between a citizen of the State where the suit is brought, and a citizen of another State; provided, that no circuit court (of the United States) shall have cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange. (1 Bright. Dig. 126-'7; Rev. Stats. U. S. p. 109, &c., § 629; 1 Abb. U. S. Pract. 304-'5 & seq; Desty's Fed. Proced. 52, 53; *Turner v. Bank of N. America*,

4 Dal. 8; *Montalet v. Murray*, 4 Cr. 46; *Young v. Bryan*, 6 Wheat. 146; *Mollan v. Torrence*, 9 Wheat. 537; *Evans v. Gee*, 11 Pet. 80; *Coffee v. Planters Bank*, 15 How. 187; *Bk. of U. S. v. Moss*, 6 How. 31; *Bradley v. Rhines*, 8 Wal. 396; *Lexington v. Butler*, 14 Wal. 293; *Morgan v. Gary*, 19 Wal. 83.)
W. C.

1^a. Jurisdiction of United States Circuit Courts, where the *United States are Plaintiffs*.

This subject has been sufficiently elucidated under a previous head. (See *Ante*, p. 236, &c. It will be observed that the jurisdiction exists in *all suits at common law*, (without reference to amount) where the United States, or any officer thereof, suing under the authority of any act of Congress, are plaintiffs; and in *all suits in equity*, where the matter in dispute, exclusive of costs, exceeds the sum or value of \$500, and the United States are petitioners (Rev. Stats. U. S. § 629; *Desty's Fed. Proced.* 53; *Dugan v. U. States*, 3 Wheat. 179; *Post-Master Gen. v. Early*, 12 Wheat. 144; *Parsons v. Bedford*, 3 Pet. 444.)

2^a. Jurisdiction of United States Circuit Courts, where an *Alien is a Party*.

It will be observed, that notwithstanding the eleventh section of the *judiciary act* (1 Bright. Dig. 127; Rev. Stats. U. S. p. 109, § 629, (cl. 1)), mentions, as subject to the jurisdiction of the circuit courts, *all suits* of a civil nature, at common law or in equity, where the matter in dispute exceeds \$500, where "*an alien is a party*," yet that provision must be taken in subordination to the constitution, which does not confer jurisdiction on the Federal courts where *both the parties are aliens*, but only in controversies "*between a State or the citizens thereof, and foreign States, citizens or subjects*." (*Montalet v. Murray*, 4 Cr. 46; *Mossman v. Higginson*, 4 Dal. 12; *Bradstreet v. Thomas*, 12 Pet. 59; *Piquignot v. Penn. R. R. Co.* 16 How. 104.) It is not necessary that the alien should be a *non-resident*. If he continues to owe a foreign allegiance, he may have been ever so long a resident of the same city or State, and yet, as between him and a citizen of the State, the jurisdiction of the Federal court attaches. (*Breedlove & als v. Nicolet & al*, 7 Pet. 413, 431-'2.) But it must be ex-

pressly stated in the complaint that the *defendant is a citizen* of some one of the United States. (Hodgson v. Bowerbank, 5 Cr. 303.)

We have seen that an alien is considered *to be a party* when the suit is *avowedly for his benefit*, although the nominal plaintiff be a citizen of the same State with the defendant, and that, in such a case, the jurisdiction is maintained. (Brown v. Strode, 5 Cr. 303; Irvine v. Lowry, 14 Pet. 293; McNutt v. Bland, 2 How. 9.)

It hardly needs to be stated that, in accordance with this criterion of jurisdiction, *alien heirs* may sue for land in the United States circuit court, though claiming through an ancestor who was a *citizen of the same State* as the defendant. (Weems v. George, 13 How. 190.)

The objection that *all the parties* are aliens must be made and insisted on; or else, if no objection be offered, it will be presumed to be waived, and the court will proceed to dispose of the case. (Mason v. Ship Blaireau, 2 Cr. 240; Piquignot v. Penn. Rl. Rd. Co. 16 How. 106.)

3^a. Jurisdiction of United States Circuit Courts, where the suit is between a citizen of the State where the suit is brought, and a *Citizen of another State*.

See 1 Bright. Dig. 126-'7; Rev. Stats. U. S. p. 109, § 629 (cl. 1); 1 Abb. U. S. Pract. 304; Desty's Fed. Proced. 52-'3.)

It will be remembered that the cases under all these three heads of jurisdiction are cases in *law and equity*, where the amount, exclusive of costs, exceeds \$500.

The distinction of *law and equity* here referred to, is the same as that intended by the constitution, namely: the common law distinction, so familiar to English and American *jurisprudents*. Thus, by *suits at common law* are to be understood such cases as are usually prosecuted by means of *common law actions*; and by *suits in equity* we understand those cases in which relief is sought according to the principles and practice of *equity jurisdiction*, as established in England. Hence the administration of justice is the same in all the States, and does not depend on local law. Relief in *equity* is not to be denied in the United States circuit courts, because the State where the court is sitting *has no equity-system*. (Robinson

v. Campbell, 3 Wheat. 222-'3; U. S. v. Howland, 4 Do. 108; Green v. Litter, 8 Cr. 229; Davis v. Packard, 7 Pet. 276.)

The circuit courts of the United States have original cognizance of the cases named, *concurrent with the courts of the several States*. Hence in these, as in other cases of concurrent jurisdiction, the tribunal which first obtains possession of the subject must adjudicate it, and neither party can in general be forced into another jurisdiction, although there are certain circumstances presently to be mentioned which will justify and require the removal of causes from the State courts into the United States circuit courts. (Shelby v. Bacon, 10 How. 56, 68; Desty's Fed. Proced. 58 & seq.)

The statute requires that, in order that the United States circuit courts may have cognizance, the matter in dispute must exceed, exclusive of costs, the sum or value of \$500. For the purpose of jurisdiction, the sum *in dispute* in actions *for tort*, is the *sum demanded in the declaration*. (Hulsekamp v. Teel, 2 Dall. 358; Gordon v. Longest, 16 Pet. 97.) And where the demand is not for money, and the nature of the action does not require the value of the thing demanded to be stated in the declaration, the practice is to allow the value to be *given in evidence*. (*Ex parte*, Bradstreet, 7 Pet. 634; Green v. Litter, 8 Cr. 229; 1 Abb. U. S. Pract. 304.)

The provisions touching alienage and citizenship are strictly construed, and not only must an alien *be a party*, but the controversy must be between an alien and a citizen of the United States, and as we have seen, *not between aliens*. (*Ante*, p. 262-'3.)

It will be necessary to remember here the explanation previously given of the necessity, that where the suit is between citizens of different States, if there be several parties on either side, *all must be within the description*; that is, if there be several plaintiffs, all of them must be of different States from the defendant; and so, if there are several defendants, they must all be of different States from the plaintiff, &c. (1 Abb. U. S. Pract. 305.) Nor can the *assignment* of any promissory note, or other *chose in action* (except a *foreign bill of exchange*), authorize a suit

in the United States court, unless a suit could have been maintained there if no assignment had been made. (1 Bright. Dig. 127-'8; Rev. Stats. 109, § 629, (cl. 1); Desty's Fed. Proced. 52; Bonafée v. Williams, 3 How. 574; Sheldon v. Sill, 8 How. 441; Deshler v. Dodge, 16 How. 622, *ante*, p. 261.) But it must be observed, that an executor or administrator of a decedent is not such an assignee as is here contemplated. (*Seré v. Pitot*, 6 Cr. 336.) So neither is an indorsee of a negotiable note as respects his immediate indorser; for in such a case the plaintiff does not claim through an assignment, but by a contract made *by him* with the indorser. (*Young v. Bryan*, 6 Wheat. 146; *Mollan v. Torranse*, 9 Wheat. 537; *Evans v. Gee*, 11 Pet. 80; *Keesy v. Farmers & Merch. Bk.* 16 Pet. 89.) So neither is the holder of a negotiable security which passes *by delivery merely*, such as railroad coupon bonds, or the coupons themselves. (*White v. R. Road*, 21 How. 576; *Thomson v. Lee County*, 3 Wal. 331; *Lexington v. Butler*, 14 Wal. 293.) But if the plaintiff traces his title through an intermediate indorser, he claims by *assignment*, and can only sue in the United States courts by showing that such intermediate indorser could have maintained the suit. (*Turner v. Bank of N. America*, 4 Dal. 8; *Mollan v. Torranse*, 9 Wheat. 537; *Coffee v. Planters Bank*, 13 How. 187.) And this restriction in respect to the assignee's suing applies only to promissory notes and other *choses in action*, (1 Bright. Dig. 127-'8; Rev. Stats. 109, § 629, (cl. 1),) and hence does not extend to an *assignment of property*, by which the *legal title* is transferred, supposing it to be *actually*, and not merely, *colorably* transferred; for if the grantor transfers his rights *ostensibly only*, in order to give jurisdiction to the courts of the United States, he himself retaining still his real interest, it is a *fraud upon the court*, which will not be allowed to avail. But if the property be *actually transferred*, although it be avowedly for the purpose of giving jurisdiction, it accomplishes the purpose. (*McDonald v. Smalley*, 1 Pet. 620; *Smith v. Kernochen*, 7 How. 216; *Barney v. Baltimore City*, 6 Wal. 288.)

It is to be observed, that a citizen of the Dis-

trict of Columbia, or of one of the territories of the United States, is not a "citizen of a State," so as to be qualified to sue in the Federal courts within the meaning of the judiciary act. Nay, it defeats the jurisdiction to have a citizen of the District, or of a Territory, united with a person, with respect to whom, if suing or sued alone, the jurisdiction might have been maintained. (*Hepburn v. Ellzey*, 2 Cr. 445; *N. Orleans v. Winter*, 1 Wheat. 91; *Barney v. Baltimore City*, 6 Wal. 287.)

As to the citizenship of a corporation it has, properly speaking, none, (*Paul v. Virginia*, 8 Wal. 177); but for the purposes of *jurisdiction on the part of the Federal courts*, its *habitat* is, as we have seen, in the State which *incorporated it*, without reference to the residence of the corporators or members composing it. (1 Abb. U. S. Pract. 214; *Louisville, Cin. & Ch. R. R. Co. v. Letson*, 2 How. 497; *Railway Co. v. Whitton*, 13 Wal. 283; *Ante*, p. 240; *Ohio & Miss. R. R. Co. v. Wheeler*, 1 Black. 297.)

2^m. The *Exceptional Cases* of the Jurisdiction of the United States Circuit Courts.

The exceptional character of these cases consists chiefly in the fact that *the amount in controversy is immaterial*. (1 Bright. Dig. 127-'8; Rev. Stats. U. S. p. 110, &c., § 629, (cl. 3 & seq).) The *citizenship of the parties* is also immaterial. (1 Abb. U. S. Pract. 305.)

W. C.

1ⁿ. Suits at Common Law, where the United States or any officer thereof, *under authority of any act of Congress*, are plaintiffs.

This jurisdiction is concurrent with that of the United States district courts, and in the case of the officer with that of the State courts also. See 1 Abb. U. S. Pract. 304; *Desty's Fed. Proced.* 53; *Dugan v. United States*, 3 Wheat. 179; *Postmaster Gen. v. Early*, 12 Wheat. 136; *Parsons v. Bedford*, 3 Pet. 444.

2ⁿ. Causes in *Law and Equity* arising under the revenue and postal laws, except civil, admiralty, and maritime, and seizures on land or on waters not navigable.

This jurisdiction is exclusive of the *State courts*. See 1 Abb. U. S. Pract. 304; 1 Bright. Dig. 128,

390; Rev. Stats. U. S. p. 110, § 629, (cl. 4)
Desty's Fed. Proced. 53.

- 3^a. Actions for any injuries to person or property, for or on account of acts done by plaintiff, under the *revenue laws* of the United States, or to enforce the right of citizens of the United States to vote in the several States.

See 1 Abb. U. S. Pract. 304; 1 Bright. Dig. 128; Rev. Stats. U. S. p. 111, § 629, (cl. 12); Desty's Fed. Proced. 545; *Ins. Co. v. Richie*, 5 Wal. 542.

- 4^a. Suits and proceedings for the enforcement of any penalties provided by laws regulating the carriage of passengers in merchant vessels.

See Rev. Stats. U. S. § 629, (5); Desty's Fed. Proced. 53.

- 5^a. Proceedings for the condemnation of property taken as prize during any insurrection against the United States.

See Rev. Stats. U. S. § 629, (6); *Id.* 5308-'9; Desty's Fed. Proced. 53-'4; *Union Ins. Co. v. United States*, 6 Wal. 763.

- 6^a. Suits arising under any law relating to the Slave Trade.

See Rev. Stats. U. S. § 629, (7); Desty's Fed. Proced. 54; *United States v. La Vengeance*, 3 Dal. 301; *United States v. Schooner Sally*, 2 Cr. 406; *United States v. Schooner Betsey, &c.*, 4 Cr. 446; *The Sarah*, 8 Whart. 391.

- 7^a. Suits by the assignee of any debenture for drawback of duties, issued under any law for the collection of duties against the person to whom such debenture was originally granted, or against any endorser thereof, to recover the amount of such debenture.

See Rev. Stats. U. S. § 629, (8); Desty's Fed. Proced. 54.

- 8^a. Suits by or *against National Banks*, under the act of Congress originating them.

The act of Congress in question subjects national banks to various liabilities, penalties, and forfeitures, and it is in these cases that the jurisdiction is conferred on the United States circuit courts; a jurisdiction exclusive of the *State courts*. (2 Bright. Dig. 64, § 57; 1 Abb. U. S. Pract. 305-'6; Rev. Stats. U. S. p. 111, § 629, (cl. 11); Desty's Fed. Proced. 54; *Kennedy v. Gibson*, 8 Wal. 506.)

9^a. Suits brought by (not *against*) any national bank to enjoin any proceeding by the comptroller of the currency, or any receiver acting under his direction, in pursuance of Rev. Stats. U. S. § 5237.

See Rev. Stats. U. S. § 629, (11); Desty's Fed. Proced. 54; Acts Cong. 1875.

10^a. Suits in *Law and Equity* for violations of *Patent and Copy-Rights*.

This jurisdiction is *exclusive of the State courts*; not, to be sure, in express words, but the constitution, and the legislation of Congress upon the subject confer the jurisdiction, so far as relates to the remedy for the infringements of patents or copy-rights, upon the Federal courts, in terms which *impliedly forbid it* to the State courts. (1 Bright. Dig. 194, 732; 16 U. S. Stats. 206, § 55, 215, 106; 1 Abb. U. S. Pract. 306, 542; Rev. Stats. U. S. p. 111, § 629, (cl. 9); Littlefield v. Perry, 21 Wal. 218.)

11^a. Cases under the *Civil Rights Act*.

This jurisdiction is conferred by the act itself, and is by the act declared to be *exclusive of the State courts*. (14 U. S. Stats. 27, § 3; 16 Id. 114; 17 Id. 13; 1 Abb. U. S. 3 Pract. 307; 16 U. S. Stats. 438, § 15, &c.; Rev. Stats. U. S. p. 111, § 629; (cl. 16); Desty's Fed. Proced. 55; U. States v. Reese, 2 Otto, 214; U. States v. Cruikshank, 200, 502.)

12^a. Suits to recover pecuniary forfeitures under any act to enforce the right of citizens of the United States to vote in the Several States.

See Rev. Stats. U. S. § 629, (15); Dest. Fed. Proced. 55; U. States v. Reese, 2 Otto, 214; U. States v. Cruikshank, 2 Otto, 542; Minor v. Happersett, 21 Wal. 178.

13^a. Suits on account of any injury to person or property, or of the deprivation of any right or privilege of a citizen of the United States, by any act in furtherance of a conspiracy to prevent one from accepting or holding office under the United States.

See Rev. Stats. U. S. § 629 (17); Dest. Fed. Proced. 55-'6.

14^a. Suits against any person who has knowledge of such conspiracy, and has power to prevent it, and neglects or refuses so to do.

See Rev. Stats. U. S. § 629 (18); Dest. Fed. Proced. 56.

- 15^a. Cases in Bankruptcy, under the Bankrupt Act, by way of *General Superintendence and Jurisdiction* supervisory of the District Courts; and also in certain suits *by Assignees, &c.*

This first-named jurisdiction is from its nature exclusive, as well of the district courts of the United States, as of the State courts. (14 U. S. Stats. 518, § 2; Rev. Stats. U. S. p. 112, § 630; 1 Abb. U. S. Pract. 307; Bump's Bankruptcy, 286 & seq; Desty's Fed. Proced. 56.)

The last-named jurisdiction embraces, *concurrently with the United States district courts*, "all suits at law or in equity which may or shall be brought *by the assignee* in bankruptcy, *against* any person claiming an adverse interest, or *by such person* against such assignee, touching any property or rights of property of said bankrupt transferable to or vested in such assignee." (Rev. Stats. U. S. p. 970, §§ 4979.)

Let it be observed, that this concurrent jurisdiction is confined to cases where a disputed claim *to property* adverse to that of the *assignee* is set up. The circuit court cannot entertain suits brought by the assignee *to collect debts* due to the bankrupt's estate. (Bump's Bankruptcy, 206, &c.) See 2 Abb. U. S. Pract. 307.

- 16^a. All suits to recover possession of any office, except that of elector of president or vice-president, representative or delegate in Congress, or member of a State legislature, authorized by law to be brought, wherein it appears that the sole question touching the title to such office arises out of the denial of the right to vote to any citizen offering to vote, on account of race, color or previous condition of servitude: *Provided*, That such jurisdiction shall extend only to determine the rights of the parties to such office by reason of the denial of the right guarantied by the constitution of the United States, and secured by any law to enforce the right of citizens of the United States to vote in all the States.

See Rev. Stats. U. S. § 629 (13); Id. § 2010; Dest. Fed. Proced. 55.

- 17^a. All proceedings by the writ of *quo warranto*, prosecuted by any district attorney, for the removal from office of any person holding office, except as a member of Congress or of a State

legislature, contrary to the provisions of Amendment XIV, § 3, of U. S. Constitution.

See Rev. Stats. U. S. § 629 (14); Id. § 1786; Dest. Fed. Proced. 55.

- 18ⁿ. All suits and proceedings for the punishment of officers and owners of vessels, through whose negligence or misconduct the life of any person is destroyed.

See Rev. Stats. U. S. § 629 (19); Id. § 5344; Dest. Fed. Proced. 56.

- 19ⁿ. All crimes and offences cognizable under the authority of the United States; which is an *exclusive cognizance* except where it is otherwise provided, and *concurrent with the district court*, of crimes and offences cognizable therein.

See Rev. Stats. U. S. § 629 (20); Dest. Fed. Proced. 56; U. States v. Hudson & al, 7 Cr. 32; U. S. v. Coolidge, 1 Wheat. 416; U. S. v. Bevens, 3 Wheat. 336; U. S. v. Coombs, 12 Pet. 72; Pennsylvania v. Wheeling Bridge, 13 How. 563; U. S. v. Tackalow, 1 Black. 54; U. S. v. Holliday, 3 Wal. 407.

- 3^m. Jurisdiction of the United States Circuit Courts, in Cases *removed from the State Courts*.

In a number of cases provision is made for the removal of causes from the State courts to the circuit courts of the United States, where their jurisdiction is concurrent, but there may be reason to suspect the impartiality of the State courts. In such causes, where the jurisdiction of the United States courts *depends on citizenship*, the same requirement as to amount is made as where the suit is originally brought in the circuit court, namely: that it shall exceed \$500 exclusive of costs. In other cases, where the Federal jurisdiction attaches in consequence of the suit growing out of acts done in the execution of the laws of the United States, *no particular amount* is required in order to warrant the removal from the State court to the circuit court of the United States. (Gaines v. Fuentes, 2 Otto, 10.)

W. C.

- 1ⁿ. Where Suit is commenced in a State Court *against an Alien*, or by a Citizen of that State against a Citizen of *another State*, and the amount or value exceeds \$500 exclusive of costs.

Defendant may remove it into the circuit court of the United States upon *giving security* to ap-

pear there and answer. (1 Bright. Dig. 128; Rev. Stats. U. S. p. 113 § 639 (cl. 1); Desty's Fed. Proced. 58-'9; Urtelequi v. D'Arcy, 9 Pet. 692; Ins. Co. v. Weide, 9 Wal. 680; Case of Sewing Mach. Co. 18 Wal. 563; Gordon v. Longest, 16 Pet. 104; Green v. Custard; 23 How. 486.)

See also a subsequent statute (July 1866), which somewhat modifies the right of removal where there is more than one defendant. (14 U. S. Stats. 306-'7; Rev. Stats. U. S. p. 113, § 639 (cl. 2); Desty's Fed. Proced. 59, 60.)

- 2ⁿ. Where a suit is commenced in a State court against an alien and a citizen of the State wherein it is brought, or by a citizen of such State against a citizen of the same and a citizen of another State, it may be so removed upon the petition of such defendant as against said alien or citizen of another State, at any time before final hearing, if, so far as relates to him, it is brought for the purpose of restraining or enjoining him, or is a suit in which there can be a final determination of the controversy, so far as concerns him, without the presence of the other defendants.

See Rev. Stats. U. S. § 639, (2d.); Dest. Fed. Proced. 59.

- 3ⁿ. Where a Suit is commenced in a State-court between a Citizen of that State and a Citizen of another State, and the matter in dispute exceeds \$500, exclusive of costs.

Such citizen of another State, whether he be *plaintiff or defendant*, upon affidavit that he has reason to believe, and does believe, that from *prejudice or local influence*, he will not be able to obtain justice in such State court, may cause the suit to be removed to the circuit court of the United States, provided he will give sufficient security that he will take the needful steps in order that the suit may be prosecuted in such circuit court. (14 U. S. Stats. 558-'9 (Mar. 1867); 1 Abb. U. S. Pract. 108; Rev. Stats. U. S. p. 113, § 639 (cl. 3); Desty's Fed. Proced. 60; Ins. Co. v. Dunn, 19 Wal. 214; Stevenson v. Williams, 19 Wal. 572.)

- 4ⁿ. Where a Civil Suit or Criminal Prosecution is commenced in any State court against one who is denied, or who cannot enforce the *civil-rights* belonging to him by law, the cause may be removed into the circuit court of the United States.

See Rev. Stats. U. S. § 641; Dest. Fed. Proced. 61-'2.

5^a. Where a suit is commenced in a State court against *any officer of the United States*, or other person, for any act *done under color of the Civil Rights Act* touching elections, *without regard to the amount in dispute*.

Defendant may remove the cause into the circuit court of the United States, *unconditionally*. (16 U. S. Stats. 439-'40 (Feb. 1871); Rev. Stats. U. S. p. 141; Desty's Fed. Proced. 63-'4.)

6^a. Where a Suit is commenced in a State court against any *Internal Revenue Officer* of the United States, for any act done under color of his office, &c., *without regard to the amount in dispute*.

Defendant may remove the cause into the circuit court of the United States, *unconditionally*. (14 U. S. Stats. 171 (July, 1866); 16 U. S. Stats. 261 (July, 1870); Rev. Stats. U. S. p. 115, § 643; Desty's Fed. Proced. 63-'4.)

A similar privilege of removal exists in favor of *any revenue officer of the United States*. (1 Bright. Dig. 129 (Mar. 1833); Rev. Stats. U. S. p. 115, § 643.)

7^a. Where a Suit is commenced in a State court *by an alien* against a *citizen of a State*, who is a *civil officer of the United States*, being a non-resident of that State where the suit is brought, but *personally served* with process, *without regard to the amount in dispute*.

Defendant may remove the cause into the circuit court of the United States, *unconditionally*. (17 U. S. Stats. 44 (Mar. 1872); Rev. Stats. U. S. p. 116, § 644; Desty's Fed. Proced. 65.)

The framer of the statute probably contemplated that the suit to be removed should be for some act done by the civil officer, *under color of his office*; but he has not said so, and thus the power of removal is conferred *whatever the character of the suit*, which, however, owing to the *character of the parties*, is not in contravention of the constitution.

8^a. Where a suit is commenced in any State court, against *any corporation organized under a law of the United States*, (except a *Bank*), for any alleged liability of such corporation, or any member thereof *as such*, without regard to the *amount in dispute*.

Defendant, or *any member* of the corporation, may remove the cause into the circuit court of

the United States, upon making affidavit that there is a *defence arising under or by virtue of the constitution of the United States, or any treaty or law thereof*, and offering good security to take the needful steps, that the cause may be prosecuted in the circuit court. (15 U. S. Stats. 227, (July, 1868); Rev. Stats. U. S. p. 114, § 640; Desty's Fed. Proced. 61; Railway Co. v. Whitton, 13 Wal. 283.)

- 9ⁿ. Where a suit is commenced in a State Court, against a *common carrier* by land or water, for losses occasioned by the acts of "*rebels*" during the late "*rebellion*," or by United States forces, *without regard to the amount in dispute*.

Defendant may remove the cause into the circuit court of the United States, upon giving sufficient security that he will take the needful steps to have it prosecuted there. (15 U. S. Stats. 267, (Jany. 1869); 12 U. S. Stats. 755, § 5, (March, 1863); 2 Bright. Dig. 198.)

- 10ⁿ. Where a suit is commenced in any State Court, against any *United States officer, civil or military, or against any other person*, for any arrest, trespass, or wrong done, or act omitted, during the late "*rebellion*," under *color of authority* from the President or Congress, *without regard to the amount in dispute*.

Defendant may remove the cause into the circuit court of the United States *unconditionally*. (14 U. S. Stats. 46, (May, 1866); 12 U. S. Stats. 755, § 5, (March, 1863); 2 Bright. Dig. 198.)

Before concluding this sketch of the original jurisdiction belonging to the United States courts of original jurisdiction, it is necessary to explain what might have been more fitly stated before, namely, the considerations which determines *locally*, the jurisdiction of the circuit and district courts of the United States; that is, *in what district* a suit should be brought. For this, of course, we must consult the statutes of the United States.

The policy has been in general to restrict the process of the circuit and district courts to the territorial limits of *the district for which they are held*. Thus it is enacted by the eleventh section of the judiciary act, (1 Bright. Dig. 127):

"That no civil suit shall be brought before either of these courts, against an inhabitant of the United States, by any *original process*, in any

other district than that whereof he is an *inhabitant*, or in which he *shall be found* at the time of serving the writ;" and that "no person shall be arrested in one district for trial in another, in any civil action before a circuit or a district court." See Desty's Fed. Proced. 116 to 118.

And although this act relates *in terms* only to *original process*, it is well understood that *no process whatever*, issued from the circuit or district courts, can be legally executed without the limits of the judicial district in which it is issued, unless Congress expressly *authorize it to be done*. (Conkl. Jurisd. 129.) This authority Congress has conferred in reference to *executions*. (1 Bright. Dig. 268-'9; Rev. Stats. U. S. 184, § 985, 986; 2 Abb. U. S. Pr. 160; Desty's Fed. Proced. 207.)

But this provision does not *per se* avoid any jurisdiction which these courts would otherwise possess. It is a *personal privilege* of the defendant to be sued only *within his district*. He may waive it by omitting to avail himself of the objection by plea. An appearance by the defendant and answering generally, without objection, has always been deemed a waiver. (1 Abb. U. S. Prac. 248; Pollard v. Dwight, 4 Cr. 421; Logan v. Patrick, 5 Cr. 288; Gracie v. Palmer, 8 Wheat. 699; Levy v. Fitzpatrick, 15 Pet. 167.) And so also an appearance alone, and an omission to plead, or otherwise to insist upon this privilege until a subsequent term, has been held to be a waiver of it. (Flanders v. Ætna Ins. Co. 3 Mason, 158; Harrison v. Rowan, Pet. Cir. Ct. Rep. 489).

It will be observed that the restriction which this statute imposes upon the suitor's selection of a court applies, not only in cases in which the jurisdiction depends on *citizenship*, but as well where the action is founded on an act of Congress. (1 Abb. U. S. Prac. 249; Chaffee v. Hayward, 20 How. 208.)

These restrictions interposed very inconvenient obstacles to proceedings in the United States courts, and were in a measure removed by the Act of February 28th, 1839, which enacted that "where, in any suit, at law or in equity, commenced in any court of the United States, there shall be several defendants, any one or more of

whom shall not be inhabitants of or found within the district where the suit is brought, or shall not voluntarily appear thereto, it shall be lawful for the court to entertain jurisdiction, and proceed to the trial and adjudication of such suit between the parties who may be *properly before* it; but the judgment or decree rendered therein shall not *conclude or prejudice other parties* not regularly served with process, or not voluntarily appearing to answer; and the non-joinder of parties who are not so inhabitants, or found within the district, shall constitute no matter of abatement or other objection to said suit." (1 Bright. Dig. 15, 16; 1 Abb. U. S. Prac. 249; Rev. Stats. U. S. p. 139, § 737; Desty's Fed. Proced. 115.)

This provision was intended to remove the embarrassment which in practice often arose out of the stringent tenor of the Judiciary Act of 1789, from the necessity of joining several defendants in a suit, some of whom were, and others were not, inhabitants of the district where the suit was instituted. Its effect is that persons not inhabitants of, or not found in the district, need not now be joined at all with those who are, or if they are joined, and do not waive their personal exception, by a voluntary appearance, then the court may go on to judgment or decree against the parties properly before it, as if the others had not been joined. (*Commer'l &c. Bank v. Slocomb*, 14 Pet. 60). The Act does not affect any case where persons *having an interest* are not joined, because their citizenship is such that their joinder would defeat the jurisdiction, (*Shields v. Barrow*, 17 How. 130, 139); but only formal parties, or parties whose interests are separable, (S. C.)

See 1 Abb. U. S. Prac. 250; *Barney v. Balt. City*, 6 Wal. 280; *D'Arcy v. Ketchum*, 11 How. 165; *Clearwater v. Meredith*, 21 How. 492; *Inbresch v. Farwell*, 1 Black, 566.

A subsequent statute relaxes the restriction still further, providing in substance, that in suits *not local* (for in the United States courts the distinction of *local and transitory* actions is still retained,) if there be two or more defendants *residing in different districts in the same State*, the plaintiff may sue in *either district*, and may issue a duplicate writ to the other, and carry on the suit at once against all the parties, so far as they

reside in *the same State*. And in suits of a *local nature*, if defendant lives in a different district in *the same State* from that in which the local cause of action exists, and where the suit is brought, process may be sent to his district. And in all cases of a *local nature*, at law or in equity, where the land, &c., lies partly in one district and partly in another in *the same State*, plaintiff may sue in either district, and send the process to the other. (11 U. S. Stats. 272; 1 Abb. U. S. Pract. 78-'9; 1 Brightley's Dig. 15. 16; Rev. Stats. U. S. p. 140, § 740 to 742; Desty's Fed. Proced. 117-'18.)

2*. The *Appellate Jurisdiction* of the Circuit Courts of United States.

The circuit courts exercise *appellate jurisdiction* in respect to the district courts. In cases of admiralty and maritime, and of equity jurisdiction, it is exercised by the process of *appeal*, (a process derived from the *Roman law*, and employed in those courts which in *England* adopt the method of proceeding used in that law,) and in cases at common law by *writ of error*, which is the *common law process* whereby a cause is removed into a higher court to be reviewed. The appellate jurisdiction may also be exercised by means of writs, which, when employed under different circumstances, appear to belong to the department of *original jurisdiction*. Thus, a circuit court may be required, upon the hearing of a writ of *habeas corpus*, to review a decision of the court below committing one to prison; or upon *mandamus* or *procedendo* to review a decision of the district court denying relief, or unreasonably postponing it. The power to award these writs is conferred by the 14th section of the *judiciary act*, which provides that the several courts of the United States "shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdiction, and agreeable to the principles and usages of law." (1 Bright. Dig. 792; 2 Abb. U. S. Pract. 214.) Thus, if a State court refuse to order the removal of a cause into the circuit court of the United States when such removal is proper, it may be compelled to do it by a writ of *mandamus*; although it seems, that if it be a proper case for removal, no order of the State court is necessary to perfect it, but that it may be accomplished by the defendant's entering in the circuit court at the proper

time copies of the papers, and his appearance, &c. And every subsequent step taken in the cause by the State court is *coram non judice* and void. (2 Abb. U. S. Pract. 44; *Ins. Co. v. Comstock*, 16 Wal. 270; *R. R. Co. v. Wiswall*, 23 Wal. 507; *Akerly v. Vilas*, 1 Ab. C. C. 284; *Hatch v. Rock Isl. & Pac. R. R. Co.* 6 Bl. C. C. 105; *Fisk v. Union Pac. R. R. Co.* 6 Bl. C. C. 362; S. C. 8; *Id.* 243.) So it seems a district court may by the same writ be compelled to allow an *appeal*, being of right. (2 Abb. U. S. Pract. 239; *Mussina v. Cavazos & al.*, 20 How. 289; *Perkins v. Fourniquet*, 14 How. 330.) It should be observed, however, that the power of the United States courts to award any of these writs is *not inherent*, but is conferred *by statute*, and can, therefore, be exercised only under the qualifications indicated by law. And by the inferior courts generally, they can be employed only as auxiliary to the exercise of a *judicial authority* over the case or subject-matter to which they are applied. (1 Abb. U. S. Pract. 253-'4.) This observation is applicable especially to the writ of *mandamus*, which, when it is authorized to be used at all, may be issued as well to State functionaries (in the proper case) as to those of the United States. (1 Abb. U. S. Pract. 254; *Riggs v. Johnson County*, 6 Wal. 166, 188-'9.)

The circuit courts of the United States have appellate jurisdiction in reference to the district courts in *admiralty and maritime* causes, and in all other *civil actions or suits*, where the value exceeds \$50, exclusive of costs, (1 Bright. Dig. 257; 260-'1; Rev. Stats. U. S. p. 112, § 631 to 633; 2 Abb. U. S. Pract. 234); or in bankrupt cases, \$500, (14 U. S. Stats. 517, § 8)

In *criminal cases* no writ of error is allowed from the circuit court to the district court, nor from the supreme court to the circuit court. In *such cases* there is no mode of revising a judgment of the district court in the circuit court, nor of obtaining the judgment of the supreme court, save as to points upon which the two judges of the circuit court are opposed in opinion; or where a writ of *habeas corpus* is available. (Conkl. Jurisd. 15, 21, 35; 1 Abb. U. S. Pract. 317; *Ex-parte* Gordon, 1 Black, 513; *Ex-parte* Milligan, 4 Wal. 2; *Ex-parte* McCardle, 7 Wal. 506; *Ex-parte*, Yerger, 8 Wal. 85.)

When the circuit court comes to give judgment upon a case, brought up by *appeal or writ of error*

from the district court, the district judge has, as we have seen, no voice in reviewing his own judgment. (1 Bright. Dig. 125; Rev. Stats. U. S. p. 107, § 614.)

3^b. The Supreme Court of the United States; W. C.

1^a. The *Constitution*, or *Organization* of the Supreme Court.

The supreme court is *created* by the constitution of the United States, but owes its *organization* to Congress. "The judicial power of the United States," says the constitution (Art. III, § 1), "shall be vested in *one supreme court*, and in such inferior courts as Congress may from time to time ordain and establish."

By the *judiciary act* of 1789, the supreme court was composed of one chief-justice, and of *five associate justices*; and the number having fluctuated from time to time, it now consists of one chief-justice and *eight associate justices*, of whom *six* constitute a *quorum*. (16 U. S. Stats. 44.) The associate justices take official precedence in the order of seniority of commission, so that in case of a vacancy in the office of chief-justice, or of his inability to discharge his duties, the senior associate justice presides; and in case of *his* absence, or *inability*, the next associate in date of commission succeeds, &c. (15 U. S. Stats. 80; Rev. Stats. U. S. p. 124, § 673, 674; Desty's Fed. Proced. 86 & seq.)

The supreme court holds one annual session in Washington city, commencing on the second Monday in October, with such adjourned or special terms as it may find necessary for the dispatch of business. (1 Bright. Dig. 861; 14 U. S. Stats. 209; 17 U. S. Stats. 419; Rev. Stats. U. S. p. 126, § 684; Desty's Fed. Proced. 90.)

The several justices of the supreme court have their respective circuits allotted to them by an order of that court; and it is provided, that if a new allotment be found necessary or expedient at any time, the court may make it in term, or the chief-justice in vacation; in the latter case to be binding until altered by the court. (14 U. S. Stats. 433; Rev. Stats. U. S. 106, § 606.)

A provision may here be mentioned, which is applicable to all the United States judges, and is wisely calculated at a small expense to do justice to faithful public servants, whilst it relieves the country from the necessity of retaining in service men superannuated and infirm, namely, the provision, "That any judge of any court of the United States, who, having held his commission as such *at least ten years*,

shall, after having attained to the age of *seventy years* resign his office, shall thereafter, during the residue of his natural life, receive the same salary which was by law payable to him at the time of his resignation." (16 U. S. Stats. 45, § 5; Rev. Stats. U. S. 134, § 714; Desty's Fed. Proced. 107.)

2¹. The Jurisdiction of the Supreme Court of the United States.

The jurisdiction of the supreme court is either *original* or *appellate*, and as we shall see, *chiefly appellate*, with such exceptions, and under such regulations as the Congress shall make. (U. S. Const. Art. III, § ii, 2.) The *original* jurisdiction is applicable to but *two cases*, defined by the constitution itself, and, of course, can be neither divested, circumscribed, nor enlarged by Congress. (1 Abb. U. S. Pract. 315-'16 & seq; Conkl. Jurisd. 17 & seq; Bac. Abr. Courts of U. S. (A), II, § 2, (1); Desty's Fed. Proced. 91 & seq; W. C.

1¹. *Original Jurisdiction* of the Supreme Court of the United States.

The original jurisdiction of the supreme court embraces only two classes of causes, namely :

(1), Those which *affect ambassadors, other public ministers, and consuls* ; and

(2), Those in which a *State shall be a party*.

The reason for submitting these cases to the *Federal judiciary* has been already explained, (*Ante*, p. 243.) Similar considerations justify the *original cognizance concerning them* of the *supreme court*. Causes which are so intimately connected with the public peace at home and abroad, and which touch the dignity and interests of foreign sovereigns, and of the *quasi* sovereign members of the Union, cannot be safely committed to any other than the highest judicature of the Confederacy, which should *in the first instance* have original jurisdiction of such cases, that, if it be not *exclusive*, it may at least be *primarily resorted to*, when the delays of a procrastinated controversy in inferior tribunals might endanger the repose, or the interests of the government. (2 Stor. Const. § 1658, 1659 ; Federalist, No. LXXX ; 1 Tuck. Bl. App'x, 361.)

This jurisdiction is *exclusive* when such ministers or States are *defendants*, but not so, if they are *plaintiffs*, and choose to sue elsewhere. (1 Bright. Dig. 861 ; Rev. Stats. U. S. 125, § 711, (cl. 8).)

The court exercises its original cognizance under

the direct authority of the constitution, and no legislation by Congress is needed to enable it to do so. (*R. Island v. Massachusetts*, 12 Pet. 657.) The court itself may mould and regulate the process employed as will best subserve the purposes of justice. (*Kentucky v. Dennison, Gov'r, &c.*, 24 How. 66, 98.) For the mode of proceeding against a *State*, see (besides the cases just cited) *N. Jersey v. New York*, 5 Pet. 284; *Missouri v. Iowa*, 7 How. 660.

And as it is not competent to Congress in any manner to *alter or disturb* the original jurisdiction conferred by the constitution on the supreme court, so any legislation professing to assign to that court any *original cognizance* in cases other than the two above enumerated (as, *e. g.*, to issue writs of *mandamus* to persons holding office under the authority of the United States,) is void. (*Marbury v. Madison*, 1 Cr. 137; *Cohens v. Virginia*, 6 Wheat. 264; *Osborne v. Bank of U. States*, 9 Wheat. 738; *In re Metzger*, 3 How. 176, 191-'2; *In re Kaine*, 14 How. 119.)

Whatever *original jurisdiction*, by way of *mandamus*, to compel the executive officers of the United States to do certain ministerial acts, exists at all in the Federal judiciary, belongs to the courts of the *District of Columbia*, and not to the district and circuit courts of the United States within the several States, (*McIntire v. Wood*, 7 Cr. 504; *McClung v. Silliman*, 6 Wheat. 598); Congress not having thought fit to bestow it upon them, although constitutionally it might have done so. (*Kendall v. United States*, 12 Pet. 618.) The circuit courts of the District of Columbia are clothed by Congress (as was indispensable,) with a much more general and comprehensive jurisdiction than the United States circuit courts in the several States, and amongst the rest with power to issue the writ of *mandamus* in all cases where it would be proper at common law. (1 Bright. Dig. 251 § 119; *Id.* 233, § 1, and n (a); *Kendall v. United States*, 12 Pet. 524, 618 & seq; *Wheelwright v. Col. In. Co.* 7 Wheat. 534; *Decatur v. Paulding*, 14 Pet. 497; *Brashear v. Mason*, 6 How. 92; *United States v. Guthrie*, 17 How. 304.)

2^d. The *Appellate Jurisdiction* of the Supreme Court of United States.

The United States constitution, after conferring upon the supreme court *original jurisdiction* in all cases affecting ambassadors, other public ministers

and consuls, and those in which a State shall be a party, proceeds to declare that, "In *all the other cases before mentioned*," (that is, in respect to the whole judicial power of the government), "the supreme court shall have *appellate jurisdiction*, both as to law and fact, with such exceptions and under such regulations as the Congress shall make." (Const. Art. III, § ii, 2.)

The court, therefore, can exercise no *appellate* power merely by force of the constitution, nor otherwise than in pursuance of the legislation of Congress, (Crawford v. Points, 13 How. 11.) And when Congress has prescribed a rule to regulate it, the court is not at liberty to depart therefrom. (Wiscant v. Dauchy, 3 Dal. 321; United States v. Moore, 3 Cr. 159; Ray v. Law, Id. 179; Durosseau v. United States, 6 Id. 307; Barry v. Mercein, 5 How. 103; Ableman v. Booth, 21 How. 506.) Hence the court, before it assumes jurisdiction, always ascertains whether the case is within the act which determines its cognizance, notwithstanding no objection be made on that ground, for in general consent cannot give jurisdiction. And for the same reason, where the statute on which the jurisdiction depends is repealed, even pending the writ of error or appeal, the appellate cognizance ceases with the Act of Congress which gave it existence. (United States v. Boisdore's Heirs, 8 How. 121; McNulty v. Batty & al, 10 How. 79; See 1 Bright. Dig. 862, 257 & seq; 2 Do. 132, 406; 14 U. S. Stats. 386, 545; Bac. Abr. Courts of U. States, (A), II, § 2 (1), 2; Conkl. Jurisd. 22; 1 Abb. U. S. Prac. 316; McCardle's Case, 7 Wal. 506; Yerger's Case, 8 Wal. 85.)

The appellate cognizance of the supreme court is either (1), from the inferior *Federal courts*; or (2), from the *State courts*;

W. C.

1¹. Appellate Jurisdiction of the Supreme Court of the United States *from the Inferior Federal Courts*.

See 1 Bright. Dig. 862, 257; 2 Do. 132, 406; 14 U. S. Stats. 386, 545; Rev. Stat. U. S. 128 & seq; § 690 to 709; Bac. Abr. Courts of U. States, (A), II, § 2, (1), 2; 1 Abb. U. S. Prac. 317; Dexty's Fed. Proced. 93 & seq.)

W. C.

1^m. Appellate Jurisdiction of the Supreme Court from the *Circuit Courts of the United States*; W. C.

1^a. Where the matter in Dispute exceeds \$2,000.

Judgments and decrees of the circuit courts may be re-examined, and reversed or affirmed, in the supreme court, when the matter *in dispute exceeds* \$2,000, in estimating which it is proper to *include the interest* with the principal. (*Udall v. Ohio*, 17 How. 17; *Olney v. Falcon*, Id. 19; *The Patapsco*, 12 Wal. 452; *Desty's Fed. Proced.* 93.)

For this purpose it is immaterial whether the suit originated in the circuit court, or was removed thither from a State court, or was brought into the circuit court by appeal or writ of error from the district court of the United States. The appellate cognizance of the supreme court is in all these cases the same. And it must be observed that in no *criminal case* is a writ of error allowed, either from the supreme court to the circuit court, nor from the circuit court to the district court. The only way in which a criminal cause can be brought into the supreme court, is upon a *certificate of difference of opinion* of the two circuit court judges. (*Ex-parte Gordon*, 1 Black. 503; *Ex-parte Milligan*, 4 Wal. 109-'10; *U. S. v. Moore*, 3 Cr. 159; *Ex-parte Kearney*, 7 Wheat. 38-42; 1 Abb. U. S. Pract. 317; *Ex-parte Watkins*, 7 Pet. 568); or by writ of *habeas corpus*. (*McCardle's Case*, 7 Wal. 506; *Yerger's Case*, 8 Wal. 88.)

The reasoning which excludes criminal causes from being reviewed in the supreme court is stated by C. J. Marshall, in *United States v. Moore*, 3 Cr. 159, as depending merely *on the words* limiting the jurisdiction, which arises exclusively out of the statute. The words "*matter in dispute*," seem, he says, "to be appropriated to *civil cases*, where the subject in contest has a value beyond the sum mentioned in the Act (\$2,000.) But in *criminal cases*, the question is the guilt or innocence of the accused. And although he may be fined upwards of \$100 (in the District of Columbia), yet that in the eye of the law is a *punishment* for the offence committed, and not the particular *object of the suit*." (1 Abb. U. S. Pract. 321.)

Similar reasoning excludes the appellate cognizance of the supreme court wherever the thing in controversy is *incapable of pecuniary estimation*. Thus, the office of *guardian*, however it

may interest the feelings, is of *no value* in law, except so far as it affords a compensation for labor and services thereafter to be earned, and the supreme court has no jurisdiction, although the minor's estate be as much as \$5,000. (*Ritchie v. Mauro*, 2 Pet. 244.) And this proposition was re-affirmed more emphatically in the subsequent case of *Barry v. Mercein*, 5 How. 119-'20, which also was a case of wardship.

The amount actually in dispute between the parties is the criterion of jurisdiction (*Grant v. McGee*, 1 Pet. 248; *Bank of Alex'r v. Hoof*, 7 Id. 168; *Genner v. U. S.* 11 How. 163.) And this has reference to the date of the judgment in the court below, with the interest included, as we have seen. (*Bank of United States v. Daniel*, 12 Pet. 52.)

The *plaintiff's claim* determines the jurisdiction on his side, and the amount adjudged or decreed *to be paid by the defendant* ascertains it on his. (*Bennett v. Butterworth*, 8 How. 120; *Knapp v. Banks*, 2 Do. 73; *Gordon v. Ogden*, 3 Pet. 33; *Smith v. Honey*, Id. 469; *Winston v. United States*, 3 How. 771.) Thus in the actions of *trover*, trespass, and trespass on the case, the amount of damages claimed in the declaration is as to the plaintiff the amount in dispute, while as to the defendant it is the sum for which judgment is given. (*Cooke v. Woodson*, 5 Cr. 13; *Gordon v. Ogden*, 3 Pet. 33 &c.; *Wise & al v. Col. Pike Co.* 7 Cr. 276; *Morrill v. Petty*, 16 Wal. 344. On the other hand, where the principal object of the action is to recover, not damages, but property, the *value of the property* is deemed the matter in dispute. (*Peyton v. Robertson*, 9 Wheat. 527; *Bennett v. Butterworth*, 8 How. 124; *Gorman v. Lennox's Ex'ors*, 15 Pet. 115.)

2^a. Where the matter in dispute *is less than \$2,000*.

There are a few cases in which a judgment or decree of a circuit court may be reviewed in the supreme court, *without regard to the sum or value in controversy*. (1 Abb. U. S. Pract. 317-'18); W. C.

1^o. Suits under the Copy-right or Patent-right laws.

See 16 U. S. Stats. 215, § 106, 107; Id. 206-'7, § 55, 56; Rev. Stats. U. S. 130, § 699, (cl. 1; Dest. Fed. Proced. 97; *Hogg v. Emer-*

son, 6 How. 477; *Stimpson v. Balt. & S. R. R. Co.*, 10 How. 346; *Sizer v. Many*, 16 How. 98; *Brown v. Shannon*, 20 How. 55.)

- 2°. Civil Actions brought *by the United States* for the enforcement of the Revenue laws, or the collection of duties

See 1 Bright. Dig. 261; Rev. Stats. U. S. 130, § 699, (cl. 2); *U. S. v. Branley*, 12 How. 88; *Mason v. Gamble*, 21 How. 391.

- 3°. Civil Actions brought against a *Collector or other officer of the Revenue* for any official act done by him, &c.

See 15 U. S. Stats. 44; Rev. Stats. U. S. 130, § 699, (cl. 3.)

- 4°. Suits in any case brought on account of the *deprivation of any right, privilege or immunity* secured by the Constitution of the United States, or of any right or privilege of a citizen of the United States. (Rev. Stats. U. S. 130, § 699, (cl. 4).)

- 5°. Civil Actions brought by any person on account of injury to his person or property by *any act in furtherance of any conspiracy* mentioned in section 1980, to prevent persons from accepting, holding, or exercising any office under the United States; or to interfere with the administration of justice, or to obstruct one in the enjoyment of his legal rights, and especially of the right of suffrage. (Rev. Stats. 130, § 699, (cl. 57).)

- 6°. Prize-causes, upon certificates of the court below, that the adjudication *involves a question of general importance*. (Rev. Stats. U. S. 129, § 695, 696.)

- 2^m. Appellate Jurisdiction of Supreme Court of United States *from the District Courts of United States*.

This appellate jurisdiction from the district courts directly to the supreme court, occurs in general only when the district courts exercise *circuit court powers*. In all other cases, with the exception of *prize-causes*, the course of appeal from the district court is to the *circuit court*. (Rev. Stats. U. S. § 695; *The Admiral*, 3 Wal. 603; *Withenbury v. U. States*, 5 Wal. 819; *The Alicia*, 7 Wal. 571.)

The mode of appeal in *cases at law* is by *writ of error*; in *cases in equity*, cases of *admiralty and*

maritime jurisdiction, and of *prize or no prize*, it is by process of *appeal*. (1 Bright. Dig. 260; Rev. Stats. U. S. 128, § 691, 692; Id. 129, § 695, 696; Id. 130, § 699; The San Pedro, 2 Wheat. 132; U. States v. Nourse, 6 Pet. 496, 470, 493; Parish v. Ellis, 16 Pet. 451; McCollum v. Eager, 2 How. 61; 1 Abb. U. S. Pract. 318; 2 Do. 246, 529, 534-'5.)

The *matter in controversy*, in order to have the decision reviewed in the supreme court, must for the most part *exceed* \$2000 in value or amount. But in *prize-causes* (in which an appeal lies in all cases from the district court *directly to the supreme court*, constituting the exception above referred to,) such appeals may be claimed, not only when the amount in controversy exceeds \$2000, but also "in other cases, on the certificate of the district judge, that the adjudication *involves a question of general importance*." (2 Bright. Dig. 393; 13 U. S. Stats. 306, § 13; Rev. Stats. U. S. 129, § 695, 696.)

3^m. Appellate Jurisdiction of the Supreme Court of the United States from the *Court of Claims*.

The court of claims was instituted in 1855. It consisted at first of *three judges*, but since 1863 has been composed of *five*. Its function is to determine all claims against the United States, founded on *any law of Congress*, or regulation of any executive department, or any contract, express or implied, with the government, which may be suggested in a petition filed, or may be referred to the court by either house of Congress. It has also jurisdiction of all set-offs, counter-claims, and claims for damages, *liquidated or unliquidated*, or other demands whatever on the part of the government against the claimant. (1 Bright. Dig. 198 & seq; 2 Do. 97-'8; Rev. Stats. U. S. 195-'6, § 1059.) From any final decree *adverse to the United States*, an appeal in behalf of the United States is allowed *without regard to the amount in controversy*. (15 U. S. Stats. 75, § 1.) But on *behalf of the claimant* an appeal is allowed in those cases only where the amount in controversy *exceeds* \$3000, or where the claim is forfeited to the United States for fraudulent practices, pursuant to section 1086. (2 Bright. Dig. 98; 12 U. S. Stats. 765, § 5; Rev. Stats. U. S. 132, § 707.)

The following cases may be referred to as hav-

ing gone up by way of appeal from the court of claims to the supreme court, namely: *De Groot v. United States*, 5 Wal. 419; *United States v. Adams*, 6 Wal. 101; *Ex-parte Zellner*, 9 Wal. 245; *United States v. Ayres*, 9 Wal. 608; *United States v. Adams*, 9 Wal. 661; *Ex-parte Roberts*, 15 Wal. 384; *Vigo's Case*, 21 Wal. 648; *Moore v. United States*, 1 Otto, 270; *United States v. McKee*, Id. 442; *Roberts v. United States*, 2 Otto, 41; *Totten v. United States*, Id. 105; *Intermingled Cotton Cases*. Id. 651.)

4^m. Appellate Jurisdiction of the Supreme Court of the United States, from the *Courts of the Territories of the United States*.

Such appellate jurisdiction is conferred and regulated by the act of Congress which organizes each territory. It seems to be generally limited to cases where the amount or value *exceeds* \$1000. (1 Bright. Dig. 685; Id. 695; Id. 452; Rev. Stats. U. S. 131, § 702 to 704; 1 Abb. U. S. Pract. 320; *Freeborn v. Smith*, 2 Wal. 173; *Territory v. Lockwood*, 3 Wal. 239; *Hornbuckle v. Toombs*, 18 Wal. 648; *Hushfield v. Graffith*, 18 Wal. 657; *Davis v. Bilsland*, 18 Wall. 659.)

5^m. Appellate Jurisdiction of the Supreme Court of the United States from the *Supreme Court of the District of Columbia*.

Down to 1863 the highest court in the District of Columbia (under the supreme court of the United States) was the *circuit court* of the District, with powers in most particulars the same as those of the circuit courts of the United States, and in a few particulars greater; and from that circuit court of the District causes might be removed, by appeal, &c., to the supreme court of the United States, wherever "the matter in dispute" was of the *value* of \$1000 or upwards, exclusive of costs. (Bright. Dig. 235, § 13.) By act of March 3, 1863, the judiciary system of the District was remodelled, and instead of a circuit, district, and criminal court, as before, there was constituted a *supreme court*, composed of four justices, who administer individually a separate original jurisdiction, civil and criminal, with resort by way of appeal to such as consider themselves aggrieved by any action of the judges singly, to the whole bench of four, constituting what is called "*the general term*." This general term, or supreme court proper, has the same cognizance that

the circuit court of the District formerly had, and "any *final judgment, order, or decree* of said court may be re-examined, and reversed or affirmed, in the supreme court of the United States, upon *writ of error* or *appeal*, in the same cases, and in like manner, as is now provided by law in reference to the final judgments, orders, and decrees of the circuit court" for the District. (1 Bright. Dig. 117 & seq; 12 U. S. Stats. 762, &c., § 1 & seq; Rev. Stats. U. S. 132, § 705.)

But whilst, as a general rule, in order to remove a cause from the supreme court of the district to the supreme court of the United States, by appeal or writ of error, the amount in dispute must be of the value of \$1,000 or upwards, exclusive of costs; yet it is provided that when the value is \$100, if any judge of the supreme court of the United States, upon the exhibition of a petition setting forth the errors complained of, shall be of opinion that the imputed errors involve questions of law of such extensive interest and operation as to render the final decision of them by the United States supreme court desirable, he may, at his discretion, and upon the terms prescribed by law, direct the appeal to be allowed, or the writ of error to be issued. (1 Bright. Dig. 235, § 14; Rev. Stats. U. S. 132, § 716.)

2¹. Appellate Jurisdiction of the Supreme Court of the United States *from the State Courts*.

This jurisdiction seems at first view somewhat anomalous; but it is indispensable, in order to maintain an uniform construction of the Federal constitution, laws, and treaties; to prevent the States from infringing upon the Federal authority; and to prevent them from violating those clauses of the United States constitution which restrain State action in certain cases, (*e. g.* by the enactment of *ex post facto* laws, and laws impairing the obligation of contracts.)

The jurisdiction thus to review the decisions of the State courts, is conferred on the supreme court by a clause of the judiciary act of 1789, which has obtained great notoriety as the *twenty-fifth section of the judiciary act*, by which designation it is constantly referred to and described. The constitutionality of the provision has been vehemently questioned, and especially in Virginia, whose supreme court, with something like indignation, refused to

pay any regard to a judgment of the supreme court of the United States, reversing its own judgment, and declined to allow the adverse judgment to be entered on its record. (*Hunter v. Martin*, devisee of *Fairfax*, 4 Munf. 1.) The supreme court of the United States, however, did not fail firmly to maintain the constitutionality of the section and its own jurisdiction, and the extreme, not to say the *indispensable*, utility of the arrangement has overcome all opposition. Very many cases have occurred under it, so as at once to clear up whatsoever there might have been of obscurity in its provisions, and irresistibly to illustrate the necessity for them.

The statute (1 Bright. Dig. 259; Rev. Stats. U. S. 132, § 709), remained unchanged, as it was enacted in 1789, until the act of February 5, 1867, (14 U. S. Stats. 386, § 2), which somewhat extended the provisions of the original law, without changing its general character. (Bac. Abr. Courts of U. States (A), II, § 20, 2, 3; Conkl. Jurisd. 22 & seq; 1 Abb. U. S. Pract. 322 & seq.)

The latter writer has rendered a service to the student by putting the *twenty-fifth* section of the judiciary act of 1789, in a column parallel with and along side of the late statute, (1 Abb. U. S. Pract. 323), and Mr. Wallace, (17 Wal 691) has imitated the example.

W. C.

1st. The cases wherein the Supreme Court of the United States exercises appellate jurisdiction *from the State Courts*.

The act of Congress confers this appellate jurisdiction on the supreme court, in case of a *final judgment or decree* in any suit in the *highest court* of law or equity of a State in which a decision in the suit *could be had*, where is drawn in question the several matters presently to be mentioned, and provides that such cases may be re-examined, and reversed or affirmed, in the supreme court upon a *writ of error*, in like manner as if the *judgment or decree* complained of had proceeded from a court of the United States; and the proceedings upon the reversal shall also be the same, except that the supreme court may, at its discretion, proceed to a final decision of the case, and *award execution*, or remand the cause to *the State court* from which it was removed by the writ. (Desty's Fed. Proceed. 102, &c.)

One of the most instructive cases upon this subject is that of *Martin v. Hunter's Lessee*, (1 Wheat. 304.) That case arose and was decided in April, 1794, in the district court of Virginia, at Winchester; and involved a comparison of title between David Hunter, claiming the land in controversy, which lay within the "*Northern Neck*" of Virginia under a grant of this commonwealth, and Denny Martin, a British subject, who claimed it under the will of Thomas, Lord Fairfax, who died in the county of Frederick, in December, 1781. Martin insisted that his title was confirmed by the treaty of peace and of boundaries with Great Britain, and also by the ninth article of the treaty with that country of 1794, known as Jay's Treaty. The State district court at Winchester decided the cause in favor of Martin, and Hunter thereupon removed it by writ of *supersedeas* to the supreme court of appeals of Virginia, by which the judgment of the district court was reversed. Then Martin obtained from the supreme court of the United States a writ of error, under this *twenty-fifth* section of the judiciary act; and in the latter court, the judgment of the Virginia court of appeals was reversed, and a mandate was awarded to that court, requiring it to enter judgment for Martin, affirming the judgment of the Winchester district court. When this mandate was presented in the Virginia court of appeals, in April, 1814, the question whether it should be obeyed was solemnly argued, and the judges delivered their opinions *seriatim*, and at length, concluding unanimously that the appellate power of the United States supreme court did not extend to the supreme court of Virginia; that the *twenty-fifth* section of the judiciary act was unwarranted by the constitution of the United States; that the transcript of the record was *improvidently* certified in obedience to the writ of error; that the proceedings thereon in the supreme court of the United States were *coram non judice*, in respect to the Virginia court; and that obedience to the mandate was declined. Thereupon Martin obtained a new writ of error to bring up the cause to the United States supreme court again, in consequence of the refusal to comply with the latter's mandate; and upon that writ of error, a masterly opinion, vindicating the constitutionality of the *twenty-fifth*

section, and re-affirming its former judgment unanimously, was pronounced by Mr. J. Story, (*Martin v. Hunter's Lessee*, 1 Wheat. 304); and the court proceeded to give a final judgment in favor of Martin, the plaintiff in error, confirming him in the possession of the land in controversy. As the argument of Judge Story is, perhaps, the strongest and most compact in favor of the constitutional power of Congress to enact the *twenty-fifth section*, so the views of the Virginia judges, and especially of Judge Roane, (*Hunter v. Martin*, 4 Munf. 27), may be referred to as one of the strongest presentations of the subject on the other side. It will repay the student's pains to study both with thoughtful care.

The constitutionality of this section was again called in question by Virginia, in the case of *Cohens v. Virginia*, 6 Wheat. 264, which was a case brought up to the United States supreme court by writ of error, from the *borough court of Norfolk*, that being the highest court of law or equity of the State having jurisdiction of the case. The Cohens were indicted in the borough court for selling, as it was alleged, contrary to the laws of Virginia, tickets in a lottery, authorized by Act of Congress in the *District of Columbia*; and upon a case agreed, they insisting that the *Act of Congress* authorized them to sell the tickets anywhere, the borough court gave judgment for the commonwealth, and fined the defendants \$100. To that judgment the Cohens obtained from the supreme court a writ of error, on the ground that there was drawn in question a privilege claimed *under the United States*, and the decision of the State court was *against it*. The State of Virginia appeared by one of her most distinguished lawyers, (P. P. Barbour, afterwards an associate justice of the supreme court), to resist the jurisdiction, and again the supreme court patiently and elaborately reviewed the question, and by the mouth of C. J. Marshall, delivered another argument sustaining the constitutionality of the *twenty-fifth section* with a force of reasoning which has ever since well nigh silenced dissent.

The constitutionality of this section has been denied by other States besides Virginia, as by Georgia, Pennsylvania, Ohio, and California; but it has always been fully sustained by the supreme court

of the United States, as in all the various cases presently to be mentioned.

It may be added, that if the *clerk* of the State court shall neglect or refuse to make a return to the writ of error issued under this section, by certifying the record, the supreme court of the United States will proceed against *him*, as for a contempt, thus avoiding any collision *with a state or its judges*. (U. States v. Booth, 18 How. 476.)

Lastly, let it be observed, that the writ of error lies under the twenty-fifth section, *without reference to the amount in controversy*, (Buel v. Van Ness, 8 Wheat. 312.); or the *citizenship* of the parties. (Cohens v. Virginia, 6 Wheat. 264.)

Let us consider now the *three several cases* to which this appellate jurisdiction is applicable;

W. C.

- 1^a. Where is drawn in question the *validity* of a *treaty*, or statute of, or authority exercised *under the United States*, and the decision (of the State court) *is against their validity*;
- 2^a. Where is drawn in question the *validity* of a statute of, or an authority exercised *under any State*, on the ground of their being *repugnant to the constitution, treaties, or laws of the United States*, and the decision (of the State court) is in favor of such *their validity*;
- 3^a. Where any title, right, privilege, or immunity is claimed under the constitution, or any treaty, or statute, or commission held, or authority exercised under the United States, and the decision (of the State court) is against the title, right, privilege, or immunity specially set up or claimed by either party under such constitution, treaty, statute, commission or authority.
- 2^m. The Circumstances which *must Concur*, in order to Warrant the Supreme Court to assume such Appellate Jurisdiction from a *State Court*.

See 1 Abb. U. S. Prac. 330; Conkl. Jurisd. 24, 26; City of New Orleans v. Armas, 9 Pet. 224; Worcester v. Georgia, 6 Pet. 515; McBride v. Hoey, 11 Pet. 167; Chateau v. Marguerite, 12 Pet. 107; Holmes v. Jennison, 14 Pet. 540; Ins. Co. v. Treasurer, 11 Wal. 204; Bethell v. Demaret, 10 Wal. 537; Hurley v. Street, 14 Wal. 661; Long v. Converse, 1 Otto. 112; Desty's Fed. Proced. 102;

W. C.

1^a. The Judgment or Decree of the State Court *must be Final*.

The amount in controversy is immaterial; it may be ever so small. But it is required by the terms of the statute, and is therefore indispensable, that the decision of the State court *should be final*; otherwise the supreme court has no jurisdiction under the section in question. Hence the judgment of a State court merely reversing the judgment of an inferior State court, without finally deciding the cause, but remanding it for further proceedings, as by awarding a *venire facias de novo*, not being final, is not within the section, (*Houston v. Moore*, 3 Wheat. 433). So neither is an order to set aside a sheriff's return, and award *an alias execution*. (*Wells v. McGregor*, 13 Wal. 188;)

Nor any judgment of a State court involving the remanding of the cause to an inferior court *for further proceedings*. (*Winn v. Jackson*, 12 Wheat. 135; *Pepper v. Dunlop*, 5 How. 51;)

Nor an order of a State court affirming an order of an inferior court refusing to grant an injunction, although by the law of the State such an order in the inferior court may be made appealable. It is *not in its nature final*, and its being made the subject of appeal by the State law *cannot alter its nature*. (*Reddall v. Bryan & als*, 24 How. 422;)

Nor a judgment awarding or refusing a *new trial*. (*Sparrow v. Strong*, 4 Wal. 584.) This, however, was a writ of error from the supreme court of *Nevada Territory*, and the case turned rather upon the fact that the grant or refusal of a new trial is in the United States courts, a *matter of discretion* with the court below, and not reviewable upon error in an appellate court, than upon the *finality of the order*;

Nor an order overruling a motion to dissolve an injunction, but not disposing of the cause. (*Gibbons v. Ogden*, 6 Wheat. 448; *McCollum v. Eager*, 2 How. 61; *Verden v. Coleman*, 18 How. 86;)

Nor a decree dismissing a bill by the State court for *want of jurisdiction*. (*Smith v. Adsit*, 16 Wal. 189.)

But a judgment of a State court refusing to award a writ of *prohibition* is a *final judgment*.

(*Weston v. City Council of Charleston*, 2 Pet. 449.)

So also is a judgment or order, where a State court has not carried into effect a mandate of the supreme court of the United States, but has evaded it. (*Martin v. Hunter*, 1 Wheat. 304; *Ante*, p. 289; *Tyler v. McGuire*, 17 Wal. 254.)

So also is a judgment affirming a sentence below, by a court *equally divided*. (*Lessee v. Price*, 12 How. 59.)

So also is a refusal by a State court to allow the removal of a cause into the circuit court of the United States, according to law, followed by a final judgment against the plaintiff in error. (*Kanouse v. Martin*, 14 How. 23.)

And so, though the court whose judgment is to be reviewed be an *inferior court* in the State system of courts, if it be the highest court in which, by the State laws, a decision could be had in that case (*Cohens v. Virginia*, 6 Wheat. 264; *Ante* p. 290; *Miller v. Joseph*, 17 Wal. 656). The former of these cases contemplated a review in the supreme court of the judgment of the hustings court of Norfolk borough, in Virginia, and the latter had reference to the circuit court of Rockingham county, in the same State, in a case where the amount in controversy was *less than \$500*.

2°. The Decision must appear *by the Record of the State Court*, and not merely by extrinsic proof, to have been such as the *twenty-fifth section* contemplates;

W C.

1°. Although it must appear *by the Record*, yet it need not appear in *totidem verbis*.

It is enough if it appear by *clear and necessary intendment or inference* (1 Abb. U. S. Pract. 330 & seq; *Pennywit v. Eaton*, 15 Wal. 380.)

2°. Some one of the Questions stated in the Section must appear to *have actually arisen*.

It is not sufficient that such a question *was involved*; it must appear to have been *actually and distinctly raised*. (1 Abb. U. S. Pract. 331; *Farney v. Towle*, 1 Black, 350; *Hamilton Co. v. Massachusetts*, 6 Wal. 632; *The Victory*, 6 Wal. 382; *Marquese v. Bloom*, 16 Wal. 351.)

3°. Some one of the Questions stated in the Section

must appear *by the Record* to have been decided by the State Court in the manner contemplated.

See 1 Abb. U. S. Pract. 331; *Tawer v. Keach*, 15 Wal. 67; *Rl. Roads v. Richmond*, 15 Wal. 3; *Solomons v. Graham*, 15 Wal. 209; *Hall v. Jordan*, 15 Wal. 393; *Comm'cl Bank v. Rochester*, 15 Wal. 639; *Stevenson v. Williams*, 19 Wal. 572.

3^m. The Mode whereby this Appellate Jurisdiction from the State courts is exercised.

It is by *writ of error* in all cases, and never by *appeal*, no discrimination in that respect being made between cases *in equity* and cases *at law*. (1 Abb. U. S. Pract. 323, 338.)

The supreme court of the United States may *require* the clerk of the State court to certify the record, and no order of his court will justify the clerk in disobeying the process. (*United States v. Booth*, 18 How. 478.) And having pronounced judgment, the supreme court may reverse, modify, or affirm the judgment or decree of the State court, or may, at its discretion, *award execution*, or remand the cause to the court from which it was so removed. (1 Abb. U. S. Pract. 323; 14 U. S. Stats. 386, § 2; Rev. Stats. U. S. 132, § 709; *Dest. Fed. Proceed.* 102.)

But no other error is to be regarded by the supreme court of the United states, but such as the record discloses, and such as shall respect the question or questions contemplated by the *twenty-fifth section*. (1 Abb. U. S. Pract. 333; *Smith v. Maryland*, 6 Cr. 286; *Martin v. Hunter*, 1 Wheat. 304, 355; *Montgomery v. Hernandez*, 12 Wheat. 129; *Matthews v. Zane*, 7 Wheat. 164; *Mills v. Brown*, 16 Pet. 525; *Williams v. Oliver*, 12 How. 111.)

4^m. Constitutionality of the *Twenty-fifth Section of the Judiciary Act*.

We have seen that the constitutionality of the *twenty-fifth section* was at first warmly contested by Virginia, (*Hunter v. Martin*, 4 Munf. 1; *Cohens v. Virginia*, 6 Wheat. 264); but the supreme court sustained it with great force and wealth of argument, in *Martin v. Hunter*, 1 Wheat. 304; and *Cohens v. Virginia*, 6 Wheat. 264; and in a cloud of cases since it has enforced the jurisdiction with results so eminently beneficial as to have silenced all discussion on the subject.

3^l. The Modes whereby the Supreme Court of the

United States exercises its Appellate Jurisdiction from the *Inferior Federal Tribunals*.

The *principal* modes of exercising the appellate jurisdiction of the *supreme court* are, (1), *Writ of error*, applicable to cases at *common law*; (2), *Appeal*, applicable to cases in *equity*, and of *admiralty and maritime jurisdiction*; and (3), *Certificate of division* of opinion in judges of the circuit court. There are, however, besides, some *auxiliary methods* which must also be adverted to, namely: (4), *Writ of mandamus*; (5), *Writ of prohibition*; (6), *Writ of habeas corpus*; and (7), *Writs of certiorari* and of *procedendo*;

W. C.

1st. Writ of Error.

The *writ of error* is applicable in actions and proceedings at *common law*, in contradistinction to *equity*, and *admiralty and maritime jurisdiction*. (1 Abb. U. S. Pract. 337-'8, 317; Conkl. Jurisd. 20, 21, 30, 31, 38; Bac. Abr. Courts of U. States, (A), II, § 2, (1), 2; 1-Bright. Dig. 268, 689; Rev. Stats. U. S. 130, § 698, 699.)

A writ of error is a well-known process of the *common law*, in England issuing out of chancery, and constituting at once a commission from the Crown (the source of justice) to the superior court to review the decision, and a mandate to the court below, to certify the record to the higher court, with a view to such revision, and to the correction of whatever errors upon the inspection of the record may appear. In the practice of the United States courts the writ of error issues out of the *appellate court*. It is a precept in the name of the president of the United States, bearing *teste* in the supreme court, by the *chief-justice* of the United States, and authenticated by the clerk of the court. It is addressed to the judges, or the judge, of the court below, recites the complaint of error in the judgment and proceedings, and commands that the record be certified to the appellate court, in order that the error, if any, may be corrected. This writ is accompanied by what is called a *citation*, which is a summons to the adversary to appear in the appellate court on the return-day of the writ of error, and show cause why the judgment should not be corrected. The appearance of the defendant in error is commonly entered *by counsel*; the plaintiff in error files a written assignment of

errors, to which defendant in error answers by counsel, that there is *no error* in the record or proceedings, or in the giving of judgment in the court below, and thus a plain issue is presented for the determination of the court. (Bac. Abr. Error; 2 Abb. U. S. Pract. 529 & seq.)

The writ of error is obtainable, as at common law it was, *ex debito justitiæ*; but it operates as a *supersedeas*, to prevent the successful party in the court below from proceeding to enforce his judgment, in those cases only where the plaintiff in error shall give bond with sufficient security to "prosecute his writ to effect, and answer all *damages and costs*, if he fail to make his plea good." (1 Bright Dig. 258; Rev. Stats. U. S. 187, § 1000.) But at all events the plaintiff in error must give bond and security to answer *the costs*, should the judgment be affirmed. (1 Bright. Dig. 260, § 7; Rev. Stats. U. S. 187, § 1000; Desty's Fed. Proced. 212-'13.)

2^m. Appeal.

The *process of appeal* applies to cases of *equitable cognizance*, and to such as belong to *admiralty and maritime jurisdiction*; and to these classes of cases it is *exclusively* applicable, a *writ of error* being wholly inadmissible therein, save only when cases are brought up to the supreme court of the United States for review *from the State courts*, where, by statute, the *writ of error alone* can be employed, whether the cause be one *in equity* or *at law*. (1 Bright. Dig. 258, 261, 269; Rev. Stats. U. S. 128, § 691, 692; Id. 130, § 699; 1 Abb. U. S. Pract. 337-'8, 317; Conkl. Jurisd. 20, 21, 30, 38, 41, 162-'3; The San Pedro, 2 Wheat. 132; McCollum v. Eager, 2 How. 61; Verden v. Coleman, 22 How. 192; Lytle v. Arkansas, Id. 193.)

The distinction between a *writ of error* and an *appeal* should not be lost sight of. A *writ of error*, let it be remembered, is a common law writ, whereby a cause *at law* is removed from a lower to a higher court in general, in order *to be reviewed*, in respect to *questions of law alone*, questions of fact being by the common law modes of procedure, determined *by a jury*; whilst an *appeal* is a process originating in the *Roman law*, and employed in those courts in England which adopt their methods of procedure from the Roman law; say, for the present purpose, the courts of equity, and

of admiralty, and maritime jurisdiction. It removes the cause into the appellate court, there to be re-heard, (upon the proofs contained in the record), in respect to *the facts as well as the law*. (1 Abb. U. S. Pract. 337-'8; Wiscant v. Dauchy, 3 Dall. 321; U. States v. Goodwin, 7 Cr. 108; Cohens v. Virginia, 6 Wheat. 264.)

Some of the States have abolished the distinction between *law and equity*, so familiar in England and in Virginia; and Louisiana, basing its jurisprudence upon the Roman law, has never known the distinction. How then, in the proceedings in the United States courts sitting in such States, (those courts always employing the modes of practice of the States where they sit), is it to be known whether the case, when the decision is to be reviewed, calls for a *writ of error*, or for an *appeal*? It is well settled that the process to be employed will depend upon the *nature of the case* as it appears in the record. If it is such a case as at *common law* would be the subject of an *action at law*, the writ of error must be employed; and if one which, at *common law*, would be properly the subject of a *bill in equity*, then an appeal must be resorted to. (Surgett v. Lepier, 8 How. 48; Brewster v. Wakefield, 22 How. 118; Reddall v. Bryan & als, 24 How. 420; *Ex parte* Dubuque & Pac. R. R. Co. 1 Wal 69.)

The proceeding by way of appeal is as much at the discretion of the suitor as that by way of writ of error. The party appealing files in the *appellate court* a petition, setting forth the character of the cause, and the substance of the decree complained of, and asking that "the decree and the bill, answer, pleadings, depositions, evidence and proceedings, in the said cause may be sent to the supreme court of United States without delay, and that the said supreme court will proceed to hear the said cause anew," and that the decree may be reversed. Thereupon, there issues *as of course*, a *citation*, signed by one of the supreme court judges, summoning the defendant in error to appear in the supreme court on a day named, "to do and receive what may appertain to justice to be done in the premises." Upon this being duly served, the defendant in error may *by counsel* enter his appearance, and then the cause is ready for

hearing by the court. (2 Abb. U. States Prac. 535-'6.)

The appeal does not operate as a *supersedeas* any more than a writ of error, unless a bond be given, with sufficient surety, and in sufficient amount, with condition to prosecute his appeal to effect, and to *answer all costs and damages*, if he shall fail to make good his plea. But in all cases, a bond shall be executed sufficient in amount to answer all such costs, as upon affirmance of the decree may be adjudged to the respondent in error. (1 Bright. Dig. 258-'9, § 2, 3; Id. 260, § 7; Rev. Stats. U. S. 187, § 1000; Catlett v. Brodie, 9 Wheat. 553; Stafford v. Union Bank, 16 How. 135; French v. Shoemaker, 12 Wal. 86; Bigler v. Waller, 12 Wal. 142; Desty's Fed. Proceed. 212-'13.)

3^m. Certificate from the Circuit Court of a *Division of Opinion* between the two Judges sitting there.

Wherever any question occurs before a circuit court, when the opinions of the judges (there being two sitting), are opposed, the point upon which the disagreement happens may be stated, under the direction of the judges, and certified to the supreme court to be finally decided, and the decision of the supreme court is transmitted to the circuit court, and is to govern it. (1 Bright. Dig. 260; Rev. Stats. U. S. 129, § 697; Conkl. Jurisd. 33, 38; Bac. Abr. Courts of U. States, (A), II, § (1), 2, 4; 1 Abb. U. S. Pract. 339; Ins. Co. v. Dunham, 11 Wal. 21-'2; Desty's Fed. Proceed. 96-'7.)

This subject has been already explained, and it will suffice now to refer to that exposition. See *Ante*, p. 258.

4^m. Writ of *Mandamus*.

The supreme court of the United States has power to award the writ of *mandamus* only as auxiliary to its *appellate jurisdiction*, that is, to the *inferior judicial tribunals* of the United States, and not to *executive officers*. The latter would be the exercise of an *original jurisdiction*, which Congress cannot constitutionally confer on the supreme court, although, by the thirteenth section of the *Judiciary Act of 1789*, it seems to have designed to do so. (1 Bright. Dig. 862; Rev. Stats. U. S. 127, § 688; *Marbury v. Madison*, 1 Cr. 137; *United States v. Guthrie*, 17 How. 284; *Metzger's Case*, 5 How.

176, 191-'2; *In re Kaine*, 14 How. 119; Conkl. Jurisd. 39, 17, 155; 2 Abb. U. S. Pract. 44, 214; 239; 1 Do. 303, 341.)

Thus the supreme court has employed a writ of *mandamus* as incident to its appellate jurisdiction, in order to compel the inferior court to *sign a bill of exceptions* (*Ex-parte* Crane, 5 Pet. 190); to *enter up judgment* which has been already pronounced, and requires nothing but the formal entry, (*Ins. Co. v. Wilson*, 8 Pet. 291); or to *execute the "mandate" of the supreme court*, by entering judgment according to its terms. (*Stafford v. Union Bank*, 17 How. 275; *Sibbald v. United States*, 12 Pet. 492-'3); to *reinstate a cause* erroneously dismissed (*Ex-parte* Bradstreet, 7 Pet. 634); to *restore an attorney* illegally disbarred (*Ex-parte* Bradley, 7 Wal. 364; *Ex-parte* Robinson, 19 Wal. 513); or, in short, to compel the doing of any other *ministerial act* by the *inferior courts* of the United States, when there is *no other specific remedy*. (*Ex-parte* Russell, 18 Wal. 664; *Ex-parte* Newman, 14 Wal. 152, 168-'9.)

5^m. Writ of Prohibition.

A writ of prohibition is a writ issued by a superior court, directed to the judge and parties to a suit in an *inferior court*, commanding them to cease from the prosecution of the same, upon a suggestion that the cause originally, or some collateral matter arising therein, does not belong to that jurisdiction, but to the cognizance of some other court; or that the court has attempted to proceed by rules differing from those which ought to be observed. (Bouv. Law Dict. *Prohibition*; Bac. Abr. *Prohibition*.)

The courts to which a writ of prohibition is addressed, are for the most part *courts not of record*, *e. g.* the courts ecclesiastical and courts maritime, in England. (3 Bl. Com. 112 & seq.)

The supreme court is expressly empowered by the *judiciary act* (§ 13,) to "issue writs of prohibition to the district courts" of the United States, "when proceeding as courts of *admiralty and maritime jurisdiction*," (1 Bright. Dig. 862; Rev. Stats. U. S. 127, § 688; Conkl. Jurisd. 39, 10, 34; U. S. v. Peters, 3 Dal. 129; *Ex-parte* Christy, 3 How. 292; *Ex-parte* Gordon, 1 Black, 503; U. S. v. Hoffman, 4 Wal. 158; *Ex-parte* Warmouth, 17 Wal. 67; *Ex-parte* Graham, 10 Wal. 541,) which is by analogy to the English practice.

6^m. Writ of *Habeas Corpus*.

The writ of *habeas corpus* is awardable by the supreme court, in order to bring up a prisoner in custody *under the authority of the United States*, as is alleged illegally, in order to inquire into the legality of the imprisonment. This is not the exercise of an original jurisdiction, but of that supervisory power which belongs to the supreme court in respect to the inferior courts of the United States, a power which is essentially *appellate*; for no one can be imprisoned *under authority of the United States*, save in the administration of some *judicial cognizance*, and in pursuance of a judicial sentence, if he chooses to invoke it, although the person actually imprisoning may be in fact an officer of the *executive department* of the government. (1 Bright. Dig. 301-'2; Rev. Stats. U. S. 141, 143, § 751 & seq; Conkl. Jurisd. 39, 35, 11; Bollman's Case, 4 Cr. 75; *Ex-parte* Kearney, 7 Wheat. 38; *Ex-parte* Watkins, 3 Pet. 193, 201; S. C. 7 Pet. 568; *Ex-parte* Wells, 18 How. 307; *Ex-parte* Milligan, 4 Wal. 2; *Ex-parte* McCardle, 6 Wal. 318; S. C. 7 Wal. 576; *Ex-parte* Lange, 18 Wal. 166; *Ex-parte* Yerger, 8 Wal. 85, 94, 104.)

See in this last case the grave rebuke administered to Congress by the supreme court, through Chief-Justice Chase, for its legislation on this subject, (8 Wal. 104, &c.)

7^m. Writs of *Certiorari*, *Procedendo*, &c.

A writ of *certiorari* is a writ issued from a superior court, to one of inferior jurisdiction, commanding the latter to certify to the former the record or proceedings in a particular case. When the record or the proceedings are thus certified to the court which awards the writ, sundry uses may be made of the possession thereof, thus:

(1), The cause may be removed, just as it is, to the court issuing the writ, not to be there *reviewed*, but to be thenceforward proceeded with in that court, as if it had originated there;

(2), The cause may be removed where the proceedings are summary, and not according to the course of the common law, in order that the court issuing the writ may inspect the proceedings, and determine whether there has been any material *irregularity* therein;

(3), The object of the writ may be merely as an auxiliary process, in order to obtain a fuller

and more complete transcript of a record, where, by accident or design, the copy first returned appears to be imperfect. (Bouv. Dict. *Certiorari*; Bac. Abr. *Certiorari*, where a pretty full account of the writ may be seen.)

The writ of *procedendo* issues in England out of the court of chancery, and in the United States out of a superior court, where judges of any subordinate court unreasonably defer the giving of judgment. The writ commands the judges of the inferior court to *proceed to judgment*, but without specifying any particular judgment; and upon any further delay the judges of the inferior court may be proceeded against *as for contempt* of the superior tribunal. (3 Bl. Com. 109-'10.)

By section fourteen of the *judiciary act* of 1789, all the courts of the United States, (or at least, the supreme, circuit, and district courts) have "power to issue writs of *scire facias*, *habeas corpus*, and *all other writs* not specially provided for by statute, which may be *necessary for the exercise of their respective jurisdictions*, and agreeable to the principles and usages of law." (1 Bright. Dig. 301-'2; Rev. Stats. U. S. 135, § 716.) And this provision includes, amongst others, power to the supreme court to award, in proper cases, the writs of *certiorari* and *procedendo*. (Conkl. Jurisd. 39, 36, 11; Fennimore v. U. S. 3 Dal. 362; Stewart v. Ingle, 9 Wheat. 526; Clark v. Hackett, 1 Black, 77; *Ex-parte* Vallandigham, 1 Wal. 243; *Ex-parte* Dongan, 2 Wal. 134; Stearns v. U. S. 4 Wal. 1; U. S. v. Adams, 9 Wal. 661.)

SECTION iii.

3^b. The Wrongs Cognizable in the several Classes of Courts.

Under this head it is proposed to set forth—

(1), The Wrongs Cognizable in the several Classes of Courts in *England*;

(2), The Wrongs Cognizable in the several Classes of Courts in *Virginia*;

W. C.

1^c. The Wrongs Cognizable in the several Classes of Courts in *England*.

Here we shall examine—

(1), The Wrongs Cognizable in the English *Ecclesiastical Courts*; and the *Proceedings therein*;

(2), The Wrongs Cognizable in the English *Military Courts*; and the *Proceedings therein*;

(3), The Wrongs Cognizable in the English *Admiralty* and *Maritime Courts*; and

(4), The Wrongs Cognizable in English Courts of *Common Law and Equity*;

W. C.

1^d. The Wrongs Cognizable in the English *Ecclesiastical Courts*, and Proceedings therein; W. C.

1^o. The Wrongs Cognizable in the *Ecclesiastical Courts*.

The wrongs cognizable at common law in the ecclesiastical courts are, (1), *Pecuniary causes*, directly relating to the *temporalities* of the church as by law established; (2), *Matrimonial causes*, relating to questions of marriage, divorce, and alimony; (3), *Testamentary causes*, including granting probate of wills, and letters of administration, and auditing the accounts of executors and administrators;

W. C.

1^f. Pecuniary Causes; W. C.

1^a. Subtraction or Withholding of Tithes from the *Parson or Vicar*.

See 3 Bl. Com. 88-9.

2^a. Non-payment of the Clergy of *Ecclesiastical Dues*, other than Tithes.

e. g.: *Mortuaries*, or presents upon the occasion of funerals, sometimes denominated *corse-presents*, and whatever falls under the denomination of *surplice-fees*, for marriages, or other ministerial offices of the church, &c. (3 Bl. Com. 89, 90; 2 Burn's Ecc. Law, 562, 481, &c.)

3^a. *Spoliation*, Dilapidation, and Neglect to Repair the Church.

Spoliation is an injury done by one clerk or incumbent to another, in taking the fruits of his benefice without right, but under a pretended title.

Dilapidation is a kind of *ecclesiastical waste* committed by the incumbent, either *voluntary*, by pulling down, or *permissive*, by suffering the chancel, parsonage-house, and other buildings thereunto belonging, to decay.

These, with neglect of reparation of the church, church-yard, and the like, are cognizable in the courts ecclesiastical, and are the principal injuries which are there cognizable. (3 Bl. Com. 91-2.)

2^f Matrimonial Causes.

By statute 20 & 21 Vict. c. 85, amended by 21 & 22 Vict. c. 108, & 22 & 23 Vict. c. 61, matrimonial causes were withdrawn from the cognizance of the ecclesiastical courts, and were submitted to a new court created by those statutes, (A. D. 1858), and known as the "*Court for divorce and matrimonial causes*." (Wms. Pers. Prop. 492.) But as the several suits of this kind, with the

mode of proceeding, and the principles of adjudication, are substantially the same as before, and as described by *Blackstone* in connexion with ecclesiastical courts, the institution of the new court need occasion no departure from the previous analysis adapted to the subject.

See 3 Bl. Com. 92-'3; 1 Brown & Hadley's Com. (B. I), 542;
W. C.

1st. Suits *Causa Jactitationis Matrimonii*—for jactitation of marriage.

When one party gives out or boasts, (*jactitat*), that he or she is *married to another*, whereby a common reputation of their marriage may ensue, the injured party may institute a suit, formerly in the *ecclesiastical*, and since 1st Jannary, 1858, in the *matrimonial court*, to ascertain judicially whether such a marriage has taken place or not; and if not, to obtain a decree *enjoining perpetual silence* on that head. (3 Bl. Com. 93; 1 Insts. Com. & Stat. Law, 280.)

2nd. Suits to compel a *Celebration of the Marriage*, in pursuance of a previous contract.

There has not been in England any jurisdiction to enforce specifically executory contracts of marriage since 26 Geo. II, c. 33 (A. D. 1753), (3 Bl. Com. 93-'4; 1 Insts. Com. & Stat. Law, 233, 251); nor has such jurisdiction ever prevailed with us.

3rd. Suits for *Restitution of Conjugal Rights*.

A suit for the restitution of conjugal rights is a suit to compel a husband or wife living separate from the consort without any sufficient reason, to come together again, if either party be weak enough to desire it contrary to the inclination of the other. (2 Bl. Com. 94; 1 Insts. Com. & Stat. Law, 281.) It seems the better opinion, that this jurisdiction for the restitution of conjugal rights does not exist in this country (Id; Bish. Marr. & Div. § 279, 502, 506, &c.)

4th. Divorce Suits.

Divorces are of two sorts: *a mensa et toro* and *a vinculo matrimonii*. A divorce *a mensa et toro* is a mere separation of the parties, suspending their cohabitation, and the husband's control over the person of the wife, without otherwise interfering with the relation between them. Whilst a divorce *a vinculo matrimonii* dissolves and terminates the marriage, and for the most part, the rights which grow out of it. (1 Insts. Com. & Stat. Law, 253.)

1st. Suits for Divorce *a mensa et toro*.

Where it becomes improper, through some superve-

nient cause arising *ex post facto*, that the parties should live together any longer, as through intolerable cruelty, adultery, perpetual disease, and the like, this unfitness or inability for the marriage state may be looked upon as an injury to the suffering party; and for this the law administers the remedy of separation, or a divorce *a mensa et toro*. (3 Bl. Com. 94; 1 Insts. Com. & Stat. Law, 253, &c.)

2^h. Suits for Divorce a *Vinculo Matrimonii*.

If a cause exists previous to the marriage, which renders the marriage void *ab initio*, as consanguinity, corporal imbecility, and the like, in this case the law looks upon the marriage to have been *always null and void*, being contracted *in fraudem legis*, and decrees not only a separation from bed and board, but a *vinculo matrimonii*,—from the bond of marriage itself. (3 Bl. Com. 94; 1 Insts. Com. & Stat. Law, 254 & seq.)

3^a. Suits for *Alimony*.

The suit for alimony is in England a consequence drawn from one of the species of divorce, that a *mensa et toro*. Alimony signifies maintenance, and the suit in question is designed to compel the husband to make the wife an allowance suitable to *their station in life*. (3 Bl. Com. 94-5; 1 Insts. Com. & Stat. Law, 281, &c.)

3^f. Testamentary Causes.

By Stat. 20 and 21 Vict. c. 77 (A. D. 1857), testamentary causes are taken from the *ecclesiastical courts*, (which had retained cognizance of them for several hundred years), and are committed to a new court by that statute created, called the "*Court of probate*," with a principal registry in London, and district registries in the various prominent divisions of the kingdom (Wins. Pers. Prop. 434; 1 Broom & Hadley's Com. 639, (B. II.); but as the various testamentary causes, the modes of procedure, and the principles of adjudication remain substantially the same as before, and as stated by Blackstone, it is not needful to make any change in the exposition merely because of the change of court where the cause is cognizable;

W. C.

1^s. The *Probate of Wills*.

The manner in which testamentary causes came to form a part of the cognizance of the ecclesiastical courts is interestingly explained by Blackstone. (3 Bl. Com. 95 & seq; 2 Do. 494 & seq, 508 & seq.)

2^s. The Grant of *Letters of Administration*.

The authority, or rather the *obligation*, upon the church courts to grant letters of administration was

created by statute 31 Edw. III, c. 11. See 2 Bl. Com. 495, 509; 3 Do. 95 & seq.

3^s. *Auditing Accounts of Executors and Administrators, and Compelling Payments of Legacies.*

See 3 Bl. Com. 98, &c.; Wentw. Off. Ex. 477, 482; Ritchie v. Rees, 1 Add. (2 Eng. Ecc. R.), 144; Gale v. Luttrell, 2 Add. (2 Eng. Ecc. R.), 234.

2^o. *The Modes of Proceeding in the Ecclesiastical Courts.*

The ecclesiastical courts of England adopted the method of proceeding employed in the civil or Roman law, with some modifications suggested by the canon law; and the two new courts above referred to as recently created (in 1858), for matrimonial and testamentary causes, have wisely not departed from the system previously applied to such causes, just as in Virginia, and generally in this country, the secular courts charged with those subjects of cognizance have always followed the method of procedure used in the ecclesiastical courts in England, in respect to them. (3 Bl. Com. 99, 100; Wms. Pers. Prop. 435, n (9); Id.; Id. 492 & seq.)

2^d. *The Wrongs Cognizable in the Military Courts, and the Modes of Proceeding therein.*

The military courts of England consist, it will be remembered, of a permanent court, called the *court of chivalry*, and occasional courts called *courts-martial*, used for the military and naval forces of the realm exclusively. The jurisdiction of the *court of chivalry* (which was distinctly defined by statute 13 Ric. II, c. 2,) extends to certain contracts, &c., touching deeds of arms or of war, including usages and customs touching matters of honor, and distinction of degrees and quality. It is practically obsolete in England, and had never any place in Virginia. The jurisdiction of *courts-martial* includes all military offences committed by persons in the naval or military service of the country; in the land-service, in pursuance of the periodical *mutiny act*, and in the navy according to more permanent statutes. (3 Bl. Com. 103-4.)

The proceedings in the *court of chivalry* are by petition in a summary way; and the trial not by a jury of twelve men, but by witnesses, (that is, by the court upon the testimony of witnesses,) or by *combat*, which latter is obsolete, and supposed to be abolished by 59 Geo. III, c. 46. (3 Bl. Com. 105.) The proceedings in *courts-martial* are regulated by statute, and are of necessity more summary than in most civil courts. The trial is of course not by a jury, but by the court, which consists of commissioned officers of the service to which the accused belongs.

For the United States statutes upon the subject, see—

For the *army*: 1 Bright. Dig. 79, Art. LXIV & seq; Rev. Stats. U. S. 212, 213, § 1198-1203; Id. 236-240, § 1342, Art. 64-114.

For the *militia*: 1 Bright. Dig. 79, Art. LXIV & seq; Id. 622; Rev. Stats. U. S. 289, § 1658.

For the *navy*: 1 Bright. Dig. 663, Art. XXXV & seq; Id. 667, § 89 & seq; Rev. Stats. U. S. 281-284, § 1624; Art. 26-54.

3^d. The Wrongs Cognizable in the *Admiralty and Maritime Courts*, and the Mode of Proceeding therein; W. C.

1^o. The Wrongs Cognizable in the Admiralty and Maritime Courts of England.

These courts have jurisdiction to try and determine all *maritime causes*; that is, such injuries which, though they are in their nature of common law cognizance, yet being committed or originating on the *high seas*, out of the reach of the ordinary courts of justice, are therefore to be remedied in a peculiar court of their own. All admiralty causes, therefore, it was formerly supposed, must be such as arise *wholly upon the sea*, and not within the precincts of any county; for the statute 13 Ric. II, c. 5, directs that the admiral and his deputy shall not meddle with anything, but only things done upon the sea; and the statute 15 Ric. II, c. 3, declares that the court of the admiral hath no manner of cognizance of any contract or of any other thing done within the body of any county, either by land or water, nor of any *wreck of the sea*, for that must be cast on land before it becomes a wreck. But it is otherwise of things *flotsam*, (*i. e.*, goods cast overboard, which continue to float on the surface,) things *jetsam* (*i. e.*, goods cast overboard, *which sink*), and things *ligan* (*i. e.*, goods cast overboard and sunk, but *tied to a buoy*, so as to indicate their locality); for over them the admiral has jurisdiction, as they are *in and upon the sea*. (3 Bl. Com. 106; 1 Do. 292; Bac. Abr. Court of Admiralty, (B).)

It is said by Blackstone, that if part of any *contract* or other cause of action doth arise upon the sea, and part upon the land, the common law excludes the admiralty from its jurisdiction, for part belonging properly to one cognizance and part to another, the common or general law takes place of the particular; and further, that the admiralty court cannot hold plea of any contract under seal. (1 Bl. Com. 106-7). This seems, however, to be hardly an accurate view of the subject; for in the first place, the fact of the contracts being *under seal* in no wise affects the jurisdiction of the admiralty, (*Menetone v. Gibbons*, 3 T. R. 267; 3 Bl. Com. 107, n (20)); and secondly, the admiralty jurisdiction depends not at all upon the *place* where the *contract*

is made, but upon *its character* as being a marine contract or not. (*Menetone v. Gibbons*, 3 T. R. 267; *Johnson v. Shippen*, 2 Lord Raym, 982, S. C. 1 Salk. 35; *Ante*, p. 250.)

And it is to be observed, that where the admiralty court hath not original jurisdiction of the cause, although there should arise in the progress of it a question proper for the cognizance of that court, yet that doth not alter nor take away the exclusive jurisdiction of the common law. And so *vice versa*, if the admiralty hath jurisdiction of the original, it hath also jurisdiction of all consequential questions, though in themselves properly determinable at common law. Thus, if a ship be taken at sea as prize, the legality of the capture is exclusively cognizable in the admiralty court; and that court, as incident thereto, has cognizance, and for the most part *exclusive cognizance*, of all demands for damages growing out of the capture, by imprisonment of the crew, &c. (*Le Caux v. Eden*, 2 Dougl. 594, 601 & seq; *Turner & al v. Neele*, 1 Lev. 243; *Ridley v. Egglefield*, 2 Lev. 25.)

The several classes of causes belonging in England to the cognizance of the admiralty court are (1), Maritime contracts; (2), Maritime *torts*; (3), *Prize-causes*; and (4), *Piracies*, and other crimes committed upon the high seas; of which the last named, not relating to the subject now in hand, need not be further considered than merely to refer to 4 Bl. Com. 268; Bac. Abr. Admiralty (D.) in connection therewith;

W. C.

1st. Maritime Contracts.

Maritime contracts are such contracts as relate to maritime affairs, as for example, contracts for the wages of seamen and subordinate officers; contracts of hypothecation of ship, &c., *in a foreign port*; contracts of marine insurance, &c. And it is quite immaterial, in respect to the jurisdiction, whether such contracts are under seal or not, or whether they are made on land or sea; just as, on the other hand, no contract is cognizable in admiralty, although made on the sea, if it do not relate to maritime affairs. (Bac. Abr. Court of Admiralty, (C); *Menetone v. Gibbons*, 3 T. R. 267; *Johnson v. Shippen*, 2 Lord Raym, 982; S. C. 1 Salk. 35; *Ante* p. 250.)

2^d. Maritime Torts.

Maritime torts include all torts committed *upon the high seas*, all of which are cognizable in the court of Admiralty. Here the *locality* is all important. If it is not committed upon the *high seas*, at least, if it has not its *inception there*, the court of admiralty has no jurisdiction. Thus, if a man takes a thing upon the sea and brings it to

land and converts it to his own use, the suit for this shall be in the admiralty court, for it is a continued act. And so if goods be taken piratically out of a ship, and afterwards sold upon land, a suit against the *vendee* may be maintained in the court of admiralty. (Bac. Abr. Court of Admiralty, (B); Ridley v. Egglesfield, 2 Lev. 25; Turner & al v. Neele, 1 Lev. 243; Anon. 2 Cro. (Eliz.) 685.)

As to what shall be denominated "*the high seas*," the English authorities are not quite agreed. No place is the high sea which is *infra corpus comitatus*, within the body of a county; but to say that merely shifts the inquiry as to what places are *infra corpus comitatus*, which is as hard to resolve as the question what is the *altum mare*, or high sea. The better opinion seems to be that the *high sea* extends to *low-water mark*, in general, and to such bays, havens and estuaries, in which the tide ebbs and flows, as are so wide that one standing on one side cannot *reasonably discern* what passes on the other; and that between high and low-water mark the jurisdiction is divided, being in the admiralty court when the tide is *at flood*, and in the common law courts when it is *at ebb* (Bac. Abr. Piracy, (p. 445-'6.) The Public Opinion, 2 Hogg; Adm. 401-'2; Hale's *De Jure Maris*, (Hargrave's Law Tracts), Pt. I, c. 17; United States v. Pirates, 5 Wheat, 184.)

As to *crimes*, the jurisdiction of the admiralty is *extended* by Stat. 28 Hen. VIII, c. 15, to "any haven, river, creek, or place where the admiral or admirals have or *pretend* to have power," &c., which gives to the courts of admiralty jurisdiction, concurrent with the common law courts, over crimes committed in the *navigable rivers*, where the tide ebbs and flows up to the *first bridges*, and according to Rex v. Bruce, (2 Leach, Cr. Cas. 1093), as far as is *frequented by ships*, although the place may be *within the body of some county*. (Bac. Abr. Piracy, (p. 445), 1 Russ. Crimes, 107 & seq.)

3^d. Prize-Causes.

In cases of *prize*, in time of war between Great Britain and some other power, or between two other nations, Great Britain being neutral, where vessels are taken at sea, and brought into port, the court of admiralty has an undisturbed and exclusive jurisdiction to determine the lawfulness of the captures according to the law of nations. (3 Bl. Com. 108; Bac. Abr. Court of Admiralty, (p. 734).)

2^o. Mode of Proceeding in the Court of Admiralty in England.

The proceedings in the English court of admiralty, as also in those of the United States, are regulated by the

civil or Roman law, with some modifications derived from the *Rhodian laws*, and the *laws of Oleron*. (3 Bl. Com. 108; 1 Insts. Com. & Stat. Law, 159; Hale. Hist. Com. Law, 40; Bac. Abr. Court of Admiralty, (E); 2 Pars. Ship. & Adm. 355 & seq.)

The *rule of practice* in the admiralty courts of the United States, (taken substantially from those of England,) may be seen, 1 Abb. U. S. Pract. 149 & seq.; and the *Forms of Practice*, 2 Abb. U. S. Pract. 370 & seq. The *subjects* of admiralty jurisdiction will also be found clearly stated, 1 Abb. U. S. Pract. 347 & seq.

The following brief analysis of the several steps to be taken in a cause in admiralty, will aid the student in studying the details at a future period:

(1), Filing the Libel.

The libel, which is equivalent to the *declaration* in the courts of common law, and to the *bill* in equity, sets forth the cause of complaint briefly, and in general terms, but clearly, and asks that the proper process may be awarded. The process is either, 1, *In rem* and *in personam*; or, 2, *In personam* only.

1, Process *in rem* and *in personam* is against the *subject concerned*, (e. g. a ship) and also against the *person* of the wrong-doer;

2, Process *in personam* only, is against merely the *person* of the party complained of;

(2), Order for the *appropriate Process*, and the Process itself.

The process *in rem* is attachment and monition; whereby the *marshal*, (the executive officer of the United States courts answering to sheriff and sergeant in the State courts), is commanded to *seize the subject*, (vessel or cargo, or whatever else it may be,) and to *give notice* to everybody concerned to interpose their claims.

The process *in personam* is either a *citation* or summons, or a *warrant of arrest*.

(3), The libellant's *security for costs*.

This security consists of a bond, with good security, in the penalty of \$250, conditioned to *pay all costs*.

(4), The respondent *admitted to bail*.

In this case, the respondent executes a bond, with good security, conditioned, where the process is *in personam*, that he will appear in court, will abide its orders, and pay the money awarded on its final decree; and where it is *in rem*, that he will abide by and perform the decree of the court.

(5), Publication of the *monition*, notifying all parties concerned to appear, and *proclamation in court*.

(6), Reference *to a commissioner* of the court to compute the amount due to the libellant.

(7), Appearance by respondent's or claimant's *proctor*, and "*stipulation*" for costs.

A *stipulation for costs* is a bond, with good security, in the penalty of \$250, conditioned *to pay costs*.

(8), Interlocutory *appraisement of vessel*, or other subject, and sale thereof.

(9), The claimant's "*stipulation*" (bond with good security), to pay the appraised, or agreed value of the vessel, &c., or the sum awarded by the court's final decree.

(10), *Exceptions to libel*, by respondent or claimant.

(11), *Answer by claimant* or respondent, and exception to answer.

(12), Interrogatories propounded to a party, and depositions of witnesses.

(13), *Interlocutory decree*, for sale of vessel, &c.

(14), *Final decree*.

See 2 Abb. Pract. U. S. Courts, 370 & seq; 2 Pars. Ship. & Adm. 490 & seq.

4^d. The Wrongs Cognizable in the Courts of *the Common Law*, (including *courts of equity*.)

All possible injuries whatsoever, that do not fall within the exclusive cognizance of either the ecclesiastical, military, or maritime tribunals, are for that very reason within the cognizance of common law courts of justice. For it is a settled and invariable principle, that every right withheld must have a remedy. (3 Bl. Com. 109);

W. C.

1^o. Proceedings to Control Inferior Courts, and *to compel them to do their duty* promptly on the one hand; and on the other, *to abstain from usurpation of jurisdiction*;

W. C.

1^t. Writ of *Procedendo*.

A writ of *procedendo ad judicium* issues in England, out of the *court of chancery*, commanding an inferior court, which unwarrantably delays judgment, *to proceed to give it*, but without specifying the judgment to be given; for that, if erroneous, must be corrected by means of a writ of error or appeal. And for further neglect or refusal to proceed, the judges of the inferior court may be punished as for *contempt*. (1 Bl. Com. 109, 110.)

It is remarkable that this writ is not unfrequently styled a *mandamus*, notwithstanding the functions and nature of a *mandamus* differ, as we shall see, so essentially from those of a *procedendo*. Such a confusion of terms we have in *Webb v. Barbour*, 4 H. & M. 462; and also in *Richardson's Case*, 3 Leigh, 343; and more conspicuously

still, in several cases in the supreme court of the United States, *e. g.* *N. York v. Adams*, 8 Pet. 291; *Ex-parte Hoyt*, 13 Pet. 290; *Ex-parte Many*, 14 How. 25.

2^d. Writ of *Mandamus*.

A writ of *mandamus* is a mandate issuing (in England) in the king's name, from the *court of king's bench*, and directed to any person, corporation, or inferior court of judicature within the king's dominions, requiring to be done some particular *ministerial act* therein specified, which appertains to their office and duty, and which the court of king's bench has previously determined to be consonant to right and justice. It is a high prerogative writ of an extensively remedial nature, and may be employed in all cases where the applicant has a right to have anything done of a *ministerial character*, and has *no other specific means* of compelling its performance, or even though there be other specific means, if it be a tedious or inadequate method of redress, as in case of the admission or restitution to an office. (3 Bl. Com. 110; High on Extra. Leg. Rem's, § 1 & seq.)

A *mandamus*, therefore, lies to compel the admission or restoration of the applicant to any office or franchise of a public nature; for the production, inspection, or delivery of public books and papers; to oblige *bodies corporate* to affix their common seal; and for an infinite number of other purposes. (3 Bl. Com. 110; *Post. p.* & seq.; High on Extra. Leg. Rem's, § 80 & seq.)

This writ is grounded on a suggestion supported by the oath of the party applying for it, of his own right and the denial of it, whereupon a rule is generally made (except when the *probable ground* is manifest,) directing the party or court complained of to *show cause* why a writ of *mandamus* should not issue; and if in answer to such rule, no sufficient cause be shown, the writ itself is issued at first in the alternative, either to do the thing, or signify some reason to the contrary; to which a return or answer must be made at a certain day. And if an insufficient reason be signified, then there issues, in the second place, a *peremptory mandamus* to do the thing absolutely, to which no other return is admitted, but a certificate of perfect obedience and due execution. (3 Bl. Com. 111; Bac Abr. *Mandamus*, and *Id.* (D), (E), &c.; *Post. p.* & seq.; High on Extra. Leg. Rem's, § 499, &c.)

If the court or person to whom the *mandamus* is addressed makes no return, or fails in his respect and obedience, he is punishable for his contempt; but if he, at the first, returns a sufficient cause, although it should be *false in fact*, the court of king's bench will not try the truth of

the facts upon affidavits; but will, *for the present*, believe him, and proceed no farther on the *mandamus*. But then the party injured may have *an action against him* for false return, and (if it be found to be false *by a jury*), shall recover damages equivalent to the injury sustained, together with a *peremptory mandamus* to the defendant to do the act in question. (3 Bl. Com. 111; Bac. Abr. *Mandamus*, (F) & seq.; 1 Rob. Pr. (1st ed.) 646.)

See further as to the subject of *mandamus*, *post* p. & seq.; High on Extra. Leg. Rem's, § 499 & seq.

3^d. Writ of Prohibition.

When a subordinate tribunal is solicited, or manifests a disposition to encroach upon the jurisdiction of the higher courts, and to exercise a cognizance not belonging to it, it is a grievance for which the common law has provided a remedy by the *writ of prohibition*. (1 Bl. Com. 111; Bac. Abr. *Prohibition*; 1 Rob. Pr. (1st ed.) 650; High on Extra. Leg. Rem's, § 762 & seq.; *Home v. Earl of Camden*, 2 Hen. Bl. 534 & seq.)

A prohibition is the king's prerogative writ (in England,) issuing properly only *out of the king's bench*,—but for the furtherance of justice, it may now also be had, in some cases, out of the court of chancery, common pleas, or exchequer,—directed to the *judge and parties* to a suit in any *inferior court*, commanding them to cease from the prosecution thereof, upon a suggestion that either the case originally, or some collateral matter arising therein, does not belong to that jurisdiction, but to the cognizance of some other court. This writ may issue either to inferior courts of *common law*, as to the county courts or courts baron, where they attempt to hold plea of any matter of the value of so much as forty shillings; or it may be directed to the court christian, the university courts, the court of chivalry, or the court of admiralty, where they concern themselves with any matter not within their jurisdiction; as if the ecclesiastical court should attempt to try the validity of a custom pleaded, or the court of admiralty a contract of debt, not relating to the sea. Or where, in handling matters within their cognizance, they transgress the bounds prescribed to them by the law of the land; as where they require *two witnesses* to prove the payment of a legacy or the like; in such cases also, a prohibition will be awarded. For as the fact of payment of a legacy is not properly a spiritual question, but only allowed to be decided in those courts, because incident or accessory to some original question clearly within their jurisdiction, it ought to be decided, where the temporal and spiritual laws differ, according

to the temporal law, else the same question might be determined in different ways, according to the court in which the suit is depending: "an impropriety," says Blackstone, "which no wise government can or ought to endure, and which is, therefore, a ground of *prohibition*." It seems also, that a prohibition may be granted to military and naval courts-martial, when they transcend the limits assigned them by the law, as where one not in the military or naval service is arraigned before them, or they violate the established rules of evidence. (3 Bl. Com. 112; Bac. Abr. Prohibition, (A), & seq. (I); Grant v. Gould, 2 Hen. Bl. 101.)

And if either the judge or the party shall proceed after such prohibition, an attachment may be had against them to punish them for the contempt; and an action will lie also against them to repair the party injured, in damages. (3 Bl. Com. 113; Bac. Abr. Prohibition, (M).)

The efforts which the clergy made at an early period to make the ecclesiastical state wholly independent of the civil, led to the constant employment of the writ of prohibition by the temporal courts, and to great discussions in respect to the proper occasions for granting it, as well as the proceedings therein of which it is expedient here to make a summary statement. See 3 Bl. Com. 113-'14; Bac. Abr. Prohibition, (C) & seq.

The party aggrieved in the court below applies to the superior court, setting forth, in a suggestion filed in the latter court, the nature and causes of his complaint, in being drawn *ad aliud examen* by a jurisdiction, or a manner of process disallowed by the law of the land; upon which, if the matter alleged appears to the court to be sufficient, the writ of prohibition immediately issues, commanding the judge of the inferior court not to hold, and the party not to prosecute the plea. But sometimes the point may be too nice and doubtful to be decided merely upon a motion, and then, for the more solemn determination of the question, the party applying for the prohibition is directed by the court to *declare in prohibition*; that is, to prosecute an action by filing a declaration against the other, upon a supposition or fiction, (which is *not traversable*, that is, not to be denied,) that he has proceeded in the suit below, notwithstanding the prohibition. And if, upon demurrer and argument thereupon, the court shall finally be of opinion that the matter suggested is a good and sufficient ground of prohibition in point of law, then judgment, with nominal damages, shall be given for the party complaining, and the defendant; and also the inferior court shall be prohibited from

proceeding any farther. On the other hand, if the superior court shall think it no competent ground for restraining the inferior jurisdiction, then judgment shall be given against him who applied for the prohibition in the court above, and the cause is remanded to the inferior court, to be there determined, in pursuance of what is called a *writ of consultation*, because upon deliberation and consultation held, the judges find the prohibition to be ill-founded. To award a *writ of consultation* is, therefore, to decline to grant the prohibition. And even in ordinary cases, the writ of prohibition is not absolutely final and conclusive; for though the ground be a proper one in *point of law* for granting the prohibition, yet if the *fact* that gave rise to it be afterwards, in the course of the inquires in the case, falsified, the cause shall be remanded to the inferior jurisdiction. If, for instance, a custom be pleaded in the spiritual court, a prohibition ought to go, because that court has no authority to try it; but if the fact of such a custom be brought to trial in a competent court, and it be there found that there is no such custom, a *writ of consultation* will be awarded. For this purpose the party prohibited may appear to the prohibition, and *take a declaration* filed by the applicant, (which must always pursue the suggestion,) and so answer the same as to plead to issue upon it, denying the contempt and traversing the custom upon which the prohibition was grounded; and if that issue be found for the defendant, he shall then have a *writ of consultation* to remand the cause to the court below. The *writ of consultation* may also be, and in England is frequently, granted by the court without any action brought, where, after a prohibition issued, upon more mature consideration, the court are of opinion that the matter suggested is not a good and sufficient ground to stop the proceedings below. "Thus careful has the law been," concludes Blackstone, "in compelling the inferior courts to do ample and speedy justice, in preventing them from transgressing their due bounds, and in allowing them the undisturbed cognizance of such causes as by right, founded on the usage of the kingdom or act of parliament, do properly belong to their jurisdiction. (3 Bl. Com. 113-'14; High. on Extra. Leg. Rem's, § 795 & seq; Bac. Abr. Prohibition, (C) to (L); Cronsher v. Collins, 1 Saund. 136 & notes.)

In England, the king's superior courts at Westminster have a superintendency over all inferior courts of what nature soever, and are by law intrusted with the exposition of such laws and acts of parliament as prescribe the extent and boundaries of their jurisdiction; so that, if

such courts assume a greater or other power than is allowed them by law, or if they refuse to allow acts of parliament, or expound them otherwise than according to their true and proper interpretation, the superior courts will prohibit and control them. The courts to which prohibitions may be awarded, and the manner in which the superior courts determine the boundaries of all inferior jurisdictions, as well amongst themselves as between the inferior and superior tribunals, are judiciously set forth in Bacon's Abridgment. (Bac. Abr. Prohibition, (I).)

In what instances prohibitions to the inferior *temporal courts* may be granted may also be seen from the same work, (Bac. Abr. Prohibition,) (K); to which reference is likewise made for the instances of prohibitions to the *spiritual courts*. (Bac. Abr. Prohibition, (L).)

The subject of prohibition having been thus far unfolded, according to the practice prevailing in England, it is best to bring under the same head the doctrines, and especially the *practice*, touching the subject as it exists in Virginia.

The writ of prohibition is mentioned as an established proceeding by Glanvil, *temp.* Hen. II, (A. D. 1187), used especially to restrain the *courts ecclesiastical*, (Glanvil, B. II, c. VIII, p. 56, &c.; Id. B. IV, c. XII, p. 96, &c.); and seems to have been a familiar process from the very earliest periods of the common law. (1 Reeve's Hist. Eng. Law, 141, 175, 453.) Hence, although we had no statute upon the subject until 1850, the writ existed with us, as at common law. Thus, it could be granted only by the *superior courts*, and not by the county courts, (Jackson v. Maxwell, 5 Rand. 637); and the proceeding was by *suggestion* in writing, setting forth the facts relied on by the applicant, and verified by affidavit. (Miller v. Marshall, 1 Va. Cas. 158; Jackson v. Maxwell, 5 Rand. 637.)

The tenor of the suggestions is exemplified in Miller v. Marshall & al, 1 Va. Cas. 158; Hutson v. Lowry & al, 2 Va. Cas. 42; and very elaborately in Grant v. Gould, 2 H. Bl. 69 & seq.

Our present statutes prescribe with precision *what courts* may award the writ, and modify considerably and to advantage the common law proceedings under it, but make no change in the cases to which it is applicable; that is, they leave intact the great principle that the *purpose of the writ of prohibition* is to keep the various *inferior courts* within the bounds of their several jurisdictions. (Bac. Abr. Prohibition; Burch v. Hardwick, 23 Grat. 58-9.)

Let us consider, therefore, (1), The courts which, in Virginia, are empowered to award a writ of prohibition ; (2), The proceedings in prohibition in Virginia; and (3), The cases to which the writ of prohibition has been applied in Virginia, and those in which it has been, or would be denied.

(1), The *courts* which, in Virginia, are empowered to award a writ of prohibition.

The courts of *general jurisdiction* to award prohibitions are the *circuit courts*, namely, of the county or corporation in which is the record, or proceeding to which the writ relates, or the judge of such *circuit court* in vacation, (V. C. 1873, c. 165, § 4); and also the corporation courts *in term*, as having, within their respective corporations, both by the constitution, (Va. Const. Art. VI, § 14), and by statute (V. C. 1873, c. 154, § 38), *the same jurisdiction as the circuit courts*.

These courts, therefore, will award prohibitions to *justices of the peace*, and the circuit courts, or judges in vacation, to the county courts, or to whatsoever inferior judicial tribunal besides, may be supposed to exist.

The court of appeals is charged with power to grant prohibitions to the circuit and corporation courts generally, and particularly to the hustings and chancery court of the city of Richmond. (Va. Const, 1869, Art VI, § 2 ; V. C. 1873, c. 156, § 4, 13.)

(2), The *Proceedings in Prohibition* in Virginia.

The statute (which originated in 1850, and was taken from 1 Wm. IV, c. 21, § 1), introduces several modifications of the proceedings at common law, the principal effects of which are to *dispense with the suggestion in writing*, if the applicant shall think fit, and to *strip the proceeding of its fictitious form*, leaving its substance only. The enactment, as it stands in the code of 1873, is as follows:

"It shall not be necessary to file a suggestion on any application for a *writ of prohibition*, but the same may be applied for on affidavits only; and in case the party applying be directed to *declare in prohibition* before writ issued, the declaration shall be expressed to be on behalf of such party only, and not on the behalf of the party and of the commonwealth, and shall contain and set forth, in a concise manner, so much only of the proceeding as may be necessary to show the ground of the application, without alleging the delivery of a writ, or any contempt, and shall conclude by praying that a writ of prohibition may issue, to which declaration the defendant may demur, or plead such matters, by way of traverse or otherwise, as may be proper to show that the writ ought not to issue,

and conclude by praying that such writ may not issue; and judgment shall be given that the writ of prohibition do or do not issue as justice may require; and the party in whose favour such judgment is given, whether on verdict or otherwise, shall recover his costs; and in case a verdict shall be given for the plaintiff the jury may assess damages, for which judgment shall also be given; but such assessment shall not be necessary to entitle the plaintiff to costs." (V. C. 1873, c. 152, § 1.)

In pursuance of these provisions, therefore, the following, as is observed by Judge Moncure, in *Mayo, Mayor, v. James*, 12 Grat. 26, would seem to be the proper course to be followed on an application for a writ of prohibition: the ground of the application should be set out in a proper suggestion, verified by affidavit, as to such material facts as do not appear on the record; or *in affidavits* instead of a suggestion, according to the Code. If upon such suggestion or affidavit, the court or judge be *clearly* of opinion that there is no good ground for a prohibition, it ought at once to be denied. But if otherwise, a *rule should be made* upon the adverse party to show cause why the writ should not be issued; for all the authorities seem to show that such a rule is necessary. (Com. Dig. Prohibition, (H. 1); Bac. Abr. Prohibition, (F); *Croucher v. Collins*, 1 Saund. 136, n (1); *Arnold v. Shields*, 5 Dana, (Ky.), 18; *Ex-parte Williams*, 4 Pike. (Ark.) 542, 545; *State v. Allen*, 2 Ired. (N. C.), Law, 183.) The execution of the rule upon the party and the judge of the inferior court will have the effect of a prohibition *quousque*, or until the discharge of the rule. Upon the return of the rule *executed*, the court or judge will make it absolute or discharge it, as may then seem to be proper; and in case he is minded to make it absolute, the applicant, in the discretion of the court or judge, or at the instance of the defendant, (unless the court or judge shall deem it unnecessary) may be directed to *declare in prohibition* before the writ is issued; and if such direction be given, the further proceedings in the case will be in accordance with the Code as cited above. The ultimate prayer, both of the petition and declaration (when a declaration is necessary, which is not always the case), is that a writ of prohibition be awarded; and when the case has been fully heard, whether on petition and answer, or on declaration and formal pleadings, the judgment, whether for or against issuing the writ, is a *final judgment*, and as such may be removed by *supersedeas* to an appellate court. (*Burch, Mayor, &c. v. Hardwicke*, 23 Grat. 56 & seq;

Supervisors of Culpeper Co. v. Gorrell & al, 20 Grat. 498-'9.)

Where the petition sets forth the facts clearly and fully,—as clearly and fully as a declaration would,—there is no need to require the applicant *to declare*, especially if the defendants have answered fully. The utmost that the court would do in such a case is to order the petition to be *treated as a declaration*. (Supervisors, &c. v. Gorrell & als, 20 Grat. 524-'5.)

The suggestion on which a prohibition is founded, or in our practice *the affidavit*, if there is no suggestion, has been sometimes likened to a *writ* commencing an ordinary action; and where the declaration, when one is filed, varies from it, it has been sometimes claimed as *ground of demurrer*. Allowing the analogy between the suggestion or petition or the affidavit and a writ in an ordinary action to be well-founded, a variance between such suggestion, &c., and the declaration would not under our statute (V. C. 1873, c. 167, § 19,) be the subject of a demurrer at all, but could be taken advantage of no other wise than by a *plea in abatement*, which must be put in at an early period of the cause. (Warwick v. Mayo, 15 Grat. 535-'6.)

(3), Cases where the Writ of Prohibition *has been awarded*, in Virginia; and also where it *has been denied*;

1st, The writ of prohibition has been granted in Virginia.—

1, Where a *title to a freehold rent* was *bona fide* drawn in question before a *justice of the peace*. Granted by the *circuit court*. (Miller v. Marshall, 1 Va. Cas. 158;)

2, Where a *title to a freehold estate in land* was *bona fide* drawn in question before a *justice of the peace*. Granted by the *circuit court*. (Warwick v. Mayo, Mayor, &c., 15 Grat. 542.)

3, Where a debt *larger than the jurisdiction of a justice of the peace* (amounting to \$80), was divided into four parts, for each of which (\$20), a note was taken, and when *all were due*, suit was brought on all, (*four several suits*) before a justice. Prohibition granted by the *circuit court* to the justice and to the parties. (Hutson v. Lowry & al, 2 Va. Cas. 42.)

4, Where a *county court* granted a prohibition to a justice of the peace, a prohibition was granted to a *county court*, from the *circuit court*. (Jackson v. Maxwell, 5 Rand. 636.)

5, To prevent a *county court* from giving judgment for costs in case of a *contested election*. (West v. Ferguson, 16 Grat. 270.)

6, To restrain a *circuit court* from taking appellate cog-

nizance of a cause decided by the county court, in a case where *no such appellate cognizance* is given by law. (Supervisors, &c., Gorrell & als, (20 Grat. 484; French v. Novel, 22 Grat. 456-'7.) Granted by the *court of appeals*.

2nd, The writ of prohibition *has been denied in Virginia* in the cases following:

1, To restrain the *mayor of a city* from trying cases of imputed violation of a *city ordinance*, alleged to be in conflict with a *State law*. (Mayo v. James, 12 Grat. 17.)

2. To restrain *any inferior court* from exercising jurisdiction in *any particular case*, if the inferior court *has jurisdiction in any case of that kind*, for that is the function of a *writ of error*. (*Ex-parte* Ellyson, 20 Grat. 24.)

3. To restrain the *executive officer of a city*, (*e. g.* the mayor), in the administration of his *executive functions*, the writ of prohibition being applicable *only to courts*, and to courts *inferior* to that which grants the writ. (Burch, Mayor, &c. v. Hardwicke, 23 Grat. 56, &c.)

4. To restrain an *inferior court* after its judgment *has been given and fully executed*.

• See Hutson v. Lowry & al, 2 Va. Cas. 42; French v. Noel, 22 Grat. 456-'7.

2°. All other Causes not included under any of the Previous Classes.

This class embraces all cases *at law and in equity*; all causes of police and economy, and all cases referred by statute to the *courts of law and equity*; and it is easy to see that it must compose immensely the largest part of the cognizance of those courts.

2°. The Wrongs Cognizable in the Several Classes of Courts in *Virginia*.

Taking into view as well the Federal as the State courts, which administer justice in Virginia, we may make two classes of courts, whose cognizance is to be particularly discriminated, namely: (1), The courts of *admiralty and maritime jurisdiction*, which, it will be remembered, are exclusively *Federal*; and (2), The courts of *common law and equity*, some of which are *State*, and others *Federal*;

W. O.

1^d. The Wrongs Cognizable in the *Admiralty and Maritime Courts* in Virginia.

The constitution of the United States (Art. III, § ii, 1) extends the judicial power of the United States to "all causes of admiralty and maritime jurisdiction," without defining its limits; and Congress, by the judiciary act of 24th September, 1789, conferred upon the *district courts* of the United States *exclusive original cognizance* of all *civil causes* of admiralty and maritime jurisdiction. (1 Bright. Dig. 24, § 1;

U. S. Stats. 76-'7, § 9; Rev. Stats. U. S. 94, § 563, (cl. 8); *Ketland v. The Cassius*, 2 Dal. 365; *Gov. of Georgia v. Madrazo*, 1 Pet. 121; *Stratton v. Jarvis*, 8 Pet. 11; *Jacker v. Montgomery*, 13 How. 498; *Bac. Abr. Courts of Adm. (c.)*; *Id. Courts of U. S. (B) II*, § 2, (4); *The Moses Taylor*, 4 Wal. 411; *Hine v. Trevor*, 4 Wal. 555; *The Belfast*, 7 Wal. 624; *The Eagle*, 8 Wal. 15; *The Lottawanna*, 20 Wal. 201; S. C. 20 Wal. 558.)

The limits of the admiralty and maritime jurisdiction were very imperfectly defined for more than fifty years after the organization of the government. It had always been admitted that the *subject-matter* of a *contract or service* gave jurisdiction to the admiralty, and the *locality* in case of *collision* of vessels, or *any other tort*; but the *locality* had been rigorously confined *within the ebb and flow of the tide*, (*Steamboat Jefferson*, 10 Wheat. 428; *Peyroux v. Howard & als*, 7 Pet. 342; *The Orleans v. Phoebus*, 11 Pet. 175; *U. S. v. Coombs*, 12 Pet. 72); and in *Waring v. Clarke*, it seems to have been regarded as an important step in advance to hold, as was held in that case, that the admiralty jurisdiction in cases of collision or other tort, extended as far up a river as the tide *ebbs and flows*, though it may be *infra corpus comitatus*, within the body of some county. (*Waring v. Clarke*, 5 How. 441, 463-'4.)

That case, which was decided in 1847, ascertained also, that the grant in the constitution extending the judicial power of the United States "to all cases of admiralty and maritime jurisdiction," is neither to be limited to, nor interpreted by, what were cases of admiralty jurisdiction in England when the constitution was adopted, but rather by reference to the jurisdiction exercised by the vice-admiralty courts in America previous to the Revolution, and by the courts of admiralty established by the respective States during the Revolution, and prior to the adoption of the United States constitution. (*Waring v. Clarke*, 5 How. 454 & seq.) This view was, in 1848, confirmed by the judgment of the supreme court in *N. J. Steam Nav. Co. v. Merchants Bank*, 6 How. 386 & seq., and has been acquiesced in ever since.

But the case of *Waring v. Clarke* brought the supreme court face to face with the difficulties and perplexities resulting from the limitation (which had theretofore prevailed) of the admiralty jurisdiction to waters within the *ebb and flow of the tide*. The collision in that instance occurred on the Mississippi river, about one hundred miles above New Orleans, and there was much doubt whether the tide flowed so high. There was a good deal of conflicting evidence, but the majority of the court thought there was sufficient proof

of tide there, and consequently it was not needful to consider whether the admiralty power extended higher. Meanwhile the immense extension of commerce by water over the vast river system of the West, and over the great lakes of the North, suggested irresistibly the abandonment of the common law idea of *navigability*, namely, the *flow of the tide*, which, however applicable to the insular situation of England, was ridiculously out of place in reference to the great rivers of a continent and its inland seas, where hostile fleets have encountered; and, in 1851, in the famous case of the *Genessee Chief v. Fitzhugh*, 12 How. 453 & seq, a new departure was taken, and the doctrine laid down that the admiralty and maritime jurisdiction granted to the Federal government by the constitution of the United States is *not limited to tide water, but extends to all public navigable lakes and rivers, where commerce is carried on between different States, or with a foreign nation.*

This doctrine has ever since prevailed, and was acted upon in the *Magnolia*, 20 How. 298; *Phila. Wil. & Balto. Co. v. Phila. & Havre de Grace Co.* 23 How. 215; *The Hine v. Trevor*, 4 Wal. 569; *The Eagle*, 8 Wal. 25. If the water be *navigable*, it seems to be not material that it is an *artificial channel*, if it connects navigable lakes, &c.—*e. g.*, the *Welland canal*, connecting lakes Erie and Ontario. (1 Abb. U. S. Pract. 358.)

Such being the *locality* which determines the jurisdiction of the admiralty courts when *it depends on locality*, we are now to consider the several classes of causes which are embraced within the admiralty cognizance of the United States. They may be enumerated as follows: (1), *Maritime contracts*; (2), *Maritime torts*; (3), *Prize-causes*; and (4), *Seizures under the laws of impost, navigation, or trade of the United States, made on waters navigable from the sea by vessels of ten or more tons*;

W. C.

1°. *Maritime Contracts.*

It will be remembered, that a maritime contract depends, not as the earlier English cases suppose, on the place where *it is made*, nor upon the locality where *it is to be performed*, nor upon the fact that *it is or is not under seal*, but upon its *subject-matter*. If the subject be maritime, the contract is maritime, although it be made on land, and is to be performed on land, and is under seal. Hence, contracts which, being in their nature maritime, are cognizable in the admiralty courts, may be enumerated as follows; many of the cases which illustrate each class being omitted here, because they have already been stated in detail, *Ante*, p. 250, &c., to which the student is referred:

W. C.

- 1^f. Contracts of *Charter-Party*, and of *Affreightment* on waters navigable for vessels used in commerce.

See *N. J. St. Nav. Co. v. Merchants Bk.*, 6 How. 344, &c.

- 2^f. Contracts for *Transportation of Passengers* on navigable waters.

See *The Moses Taylor*, 4 Wal. 411, 431.

- 3^f. *Maritime Liens*, arising either out of *contract*, (*e. g.* of affreightment), or out of *tort*, (*e. g.* from collision.)

See *The Belfast*, 7 Wal. 625, 642 & seq., &c.

- 4^f. Contracts with *Ship-carpenters*, *Material-men*, &c., for repairs, materials, and *out-fit* of a ship belonging to a *foreign nation*, or *another State*.

See *The Aurora*, 1 Wheat. 105, &c.; *The Lottawanna*, 21 Wal. 538, 578, 581.

- 5^f. Contracts of *Pilotage* and of *Salvage*, express or implied.

See 1 Abb. U. S. Pract. 151; *The Sybil*, 4 Wheat. 98; *Hobart v. Drohan*, 10 Pet. 108; *Houseman v. The N. Carolina*, 15 Pet. 40; *U. S. v. Coombs*, 12 Pet. 72; *The Island City*, 1 Black, 121; *The Comanche*, 8 Wal. 448; 1 Abb. U. S. Pract. 572.

- 6^f. *Bottomry Contracts*, whether under seal or not, for money lent to ships in *foreign parts*, to enable them to complete the voyage.

See *Menetone v. Gibbons*, 3 T. R. 269; 2 Abb. U. S. Pract. 407; *The Aurora*, 1 Wheat. 96; *Ins. Co. v. Dunham*, 11 Wal. 27.

- 7^f. Contracts for *Marine Insurance*; that is, for risks on navigable waters.

See *Marine Ins. Co. v. Dunham*, 11 Wal. 29, 35.

- 8^f. Contracts for wages of *Mariners and Subordinate officers*, and of *Master*, if the credit in the latter case were given, not as usual to the owners, but *to the Ship*.

See *the Thomas Jefferson*, 10 Wheat. 428; *Leon v. Galceron*, 11 Wal. 187-'8; 2 Abb. U. S. Pract. 397-'8; 1 Do. 613, &c.

- 9^f. *Surveys of Vessels* damaged by the perils of the sea.

See *Janney v. Col. Ins. Co.* 10 Wheat. 412, 415, 418.

And to these may be added, in default of a more legitimate place for it,—

- 10^f. Proceedings where *Joint-owners of a Ship* disagree as to its employment, to require a "*stipulation*," (that is, a bond of indemnity), for its safe return.

See Abb. U. S. Pract. 632; *The Orleans v. Phœbus*, 11 Pet. 175; 2 Abb. U. S. Pract. 404.

- 2^o. Maritime Torts.

The *locality* where the tort was committed determines the jurisdiction. It must have been on *navigable waters*

in order to come within the admiralty cognizance, (that is, on waters navigable for vessels employed in commerce), and affording a communication with *another State or a foreign country*; and that being so, it is immaterial whether the water be land-locked or open, salt or fresh, influenced by the tide or not, lying wholly in one State, or extending into or through several. And the jurisdiction, so far as it is *in rem*, is exclusive; but any common law action *in personam*, appropriate to the wrong (but not an *attachment*) is maintainable in the State courts, or (in a proper case) in the United States circuit courts, by express reservation of the ninth section of the judiciary act of 1789. (*Gennessee Chief v. Fitzhugh*, 12 How. 443; *The Hine v. Trevor*, 4 Wal. 561; *Ins. Co. v. Dunham*, 11 Wal. 26; *Ante*, p. 252, 1 Abb. U. S. Pract., 385 & seq; 2 Do. 404.)

3°. Prize-Causes.

This subject having been already explained, (*Ante*, p. 252, &c.), the student is desired to look back to that passage. See also, 1 Abb. U. S. Pract. 545 & seq.

4°. Seizures under laws of Impost, Navigation, or Trade of United States, made on *Waters navigable from the Sea, by Vessels of ten or more tons*.

This exercise of *maritime* jurisdiction being exclusively *statutory*, the student is referred to 1 Bright. Dig. 25, § 1; 1 U. S. Stats. 76-'7, § 9; Rev. Stats. U. S. 94, § 563, (cl. 3, 8); *Id.* 110, § 629, (cl. 4,) and to 1 Abb. U. S. Pract. 291, 624 & seq; 2 Do. 429-'30 & seq.

2^d. Wrongs Cognizable in the *Courts of Common Law and Equity in Virginia*.

The student will bear in mind that whilst the Federal courts administer justice in Virginia, in many cases *in law and equity*, yet most of the causes which will be mentioned under this head, belong *exclusively to the State courts*.

As we have no ecclesiastical courts, nor any permanent military courts, like the court of *chivalry*, it is apparent that the causes cognizable in those two classes of courts either do not exist here, or must be referred to the *courts of law and equity*. Hence, matrimonial and testamentary causes must be introduced under this head, and also, a class to which Blackstone assigns no specific place, namely, causes relating to *public police and economy*. The classification, therefore, of wrongs cognizable in the courts of *common law and equity* may stand as follows, namely:

- (1), Matrimonial Causes;
- (2), Testamentary and Tutorial Causes;
- (3), Causes relating to Public Police and Economy;
- (4), Causes relating to Public Justice;

(5), All other Civil Injuries, not belonging to the Admiralty or Maritime Cognizance;

W. C.

1°. Matrimonial Causes.

The matrimonial causes are substantially the same as in England, (*Ante*, p. 302, & seq.) save only, that there seems to be with us no court empowered to entertain a suit for the *restitution of conjugal rights*, (1 Insts. Com. & Stat. Law, 281.) As to writs to *compel a celebration of the marriage*, in pursuance of a previous contract, no such jurisdiction has existed in England for more than one hundred years, (not since A. D. 1753); and none ever existed here. (1 Insts. Com. & Stat. Law, 233, 239). Matrimonial causes, therefore, in Virginia are as follows:

(1), Suits *causa jactitationis Matrimonii*;

(2), Suits for Divorce; and

(3), Suits for Alimony;

W. C.

1°. Suits *Causa Jactitationis Matrimonii*.

For the nature of these suits, see 3 Bl. Com. 93; 1 Insts. Com. & Stat. Law, 280-'81; *Ante*, p. 303, &c.

The jurisdiction in such cases belongs to the State courts; and in Virginia, to the *circuit and corporation courts in chancery*. (V. C. 1873, c. 105, § 8 & seq; *Id.* c. 154, § 38; Va. Const. 1869, Art. VI, § 14.)

2°. Suits for Divorce.

See *Ante*, p. 303, &c.; 1 Insts. Com. & Stat. Law, 254 & seq.

W. C.

1°. Suits for Divorce *a Mensa et Toro*.

Suits for divorce are cognizable *exclusively* in the State courts, and suits for divorce *a mensa et toro* belong in Virginia to the *circuit courts in chancery*, (V. C. 1873, c. 105, § 8 & seq; 13,) and to the *corporation courts*, also in *chancery*, (V. C. 1873, c. 154, § 38; Va. Const. 1869, Art. VI, § 13, 15); 1 Insts. Com. & Stat. Law, 259. &c., 267, &c.

2°. Suits for Divorce *a Vinculo Matrimonii*.

Suits for divorce *a vinculo matrimonii* may with us be for *supervening causes*, as well as for such as existed at the time of the marriage. (1 Insts. Com. & Stat. Law, 261 & seq.) The jurisdiction is vested *exclusively* in the *State courts*; and where the marriage is voidable for *consanguinity or affinity*, it may be exercised by the county or corporation courts as incident to their criminal jurisdiction, (V. C. 1873, c. 192, § 3; *Id.* c. 105, § 1); whilst in all other cases, and in those also, the jurisdiction may be administered by the *circuit and corporation*

courts in chancery. (V. C. 1873, c. 105, § 8 & seq; Id. c. 154, § 38; Va. Const. Art. VI, § 14.)

3^f. Suits for Alimony.

See 3 Bl. Com. 94-'5; 1 Insts. Com. & Stat. Law, 281 & seq.

This jurisdiction also is possessed *exclusively* by the State courts, and in Virginia by the same courts that grant divorces, namely, the *circuit and corporation courts in chancery*, either as incident to the grant of a divorce *a mensa or a vinculo*, or independently of either. (V. C. 1873, c. 105, § 10, 12; 1 Insts. Com. & Stat. Law, 281 & seq.)

2°. Testamentary and *Tutorial* Causes.

1^f. The Probate of Wills.

The probate of wills, and the granting of letters of administration, and the appointment of guardians, together with the function of auditing the accounts of all these fiduciaries, and taking the needful steps to secure the interests committed to them, are in the United States confided always to *secular courts*, which, even if they have no other jurisdiction, may without much inaccuracy be classed among the courts of *common law and equity*. In Virginia these causes belong to courts which have a very large cognizance besides, including cases both at *law and in equity*. Thus it is provided that "the *circuit, county, and corporation courts* shall have jurisdiction to hear and determine suits and controversies testamentary," and "in the case of a person dying intestate, to hear and determine the right of administration of his estate," according to rules prescribed which ascertain with precision the county or corporation to whose courts application is to be made. (V. C. 1873, c. 118, § 23 & seq; Id. c. 126, § 1, 2, 3, 4 & seq; Id. c. 128, § 1, 2, 4 & seq.)

2^f. The Granting of Letters of Administration.

See the preceding head, (1^f).

3^f. The Appointment of Guardians.

Our statutes enact that every father may, by his *last will and testament*, appoint a guardian for his child, born or to be born, and for such time during its infancy as he shall direct; but the appointment is void unless, *within six months* after the probate of the will, the person so appointed shall appear in the court in which the *will shall be proved*, and give bond as required by law. (V. C. 1873, c. 123, § 1, 2.) They moreover enact that "the *circuit, county, or corporation court* of any county or corporation in which any minor resides, or if he be resident out of the State, in which he has any estate, may *appoint a guardian for him*, unless he have a guardian appointed as aforesaid by his father." (V. C. 1873, c. 123, § 3 & seq.)

4^f. Auditing Accounts of Executors, Administrators, and Guardians.

The courts which grant probate of wills, and which appoint administrators and guardians are charged with the duty of auditing their accounts, and of controlling their conduct, so far as the same can be effected by proceedings *ex-parte*. (V. C. 1873, c. 126, § 12 & seq; Id. c. 127, § 1 & seq; Id. c. 128, § 1, 2, 4 & seq; 17, 18 & seq.)

3^o. Causes Concerning *Public Police and Economy*; W. C.

1^f. Causes concerning *Public Roads and Landings*, &c.

Roads, landings, and bridges are under the jurisdiction of the *county court*, which may cause bridges to be erected and roads and landings to be established, and again to be discontinued, as it shall judge will best promote the general convenience. (V. C. 1873, c. 52, § 21 & seq; 34 & seq; 46, 47 & seq; Acts 1874-'5, p. 177, c. 181.)

2^f. Causes Concerning the *Erection of Mills*.

Jurisdiction to grant leave to erect "a water mill, or other machine, manufactory or engine useful to the public" belongs to the *county courts*. (V. C. 1873, c. 63, § 1, &c.)

3^f. Causes Concerning the *Establishment of Ferries*.

Jurisdiction to establish ferries, and also to determine the rates of ferriage, &c., is vested in the *county courts*. (V. C. 1873, c. 64, § 1, &c.)

4^f. Causes of *Bastardy*.

The cognizance of *bastardy causes* to constrain a putative father to support his bastard child, whilst it existed was conferred on the county and corporation courts. V. C. 1873, c. 121, § 1 & seq.) But for the time being, and under an apprehension of conflict with the Civil Rights Act, (it would seem an unfounded apprehension) this law is repealed. (Acts 1874-'5, p. 94, c. 112.)

To these might be added many others of like character. These, however, which have been named will sufficiently exemplify this class of causes.

4^o. Causes Concerning *Public Justice*; W. C.

1^f. Refusal or *Unreasonable Delay* of Justice by an *Inferior Court*.

This injury is remedied by a *writ of procedendo*, of which enough has already been said. See 3 Bl. Com. 109, 110; *Ante*, pp. 310, & seq.

2^f. *Encroachment* of Jurisdiction by Inferior Court.

This injury is remedied by a *writ of prohibition*, as to which the explanation already given may suffice. *Ante*, pp. 312, & seq.

3^d. Refusal of an Inferior Court, or of any Officer, to do a Ministerial Act.

This wrong is redressed by a writ of *mandamus*, provided there be *no other adequate remedy at law*; for the party's having a remedy *in equity* will not be considered as any ground of refusal. And even though he may have another specific *legal remedy*, if such remedy be *obsolete*, the *mandamus* will be granted. The general nature of this writ, and the proceedings under it, as they occur in England, have been explained already. *Ante*, p. 311 & seq. At present, it is proposed to consider (1), The courts which in Virginia are empowered to award a writ of *mandamus*; (2), The proceedings therein with us; and (3), The cases in which the writ has been awarded, and those also in which it has been denied.

See 3 Bl. Com. 110 & c, 264-'5; Bac. Abr. *Mandamus*; Id. (A), & seq; 1 Rob. Pr. (1st ed.) 646 & seq; W. C.

1st. The Courts which in Virginia are empowered to award the Writ of *Mandamus*.

It is not designed in this connexion to refer to the *Federal courts*, but exclusively to those of the *State*.

The *general jurisdiction* to award writs of *mandamus* is with us by law vested in the *circuit courts*, and the judges thereof in *vacation*, and in the *corporation courts*. "Jurisdiction of writs of *mandamus*," says the statute, "shall be in the *circuit court* of the county or corporation in which the record or proceeding is to which the writ relates. Any such writ may be awarded either by the *circuit court*, or (in *vacation*) by the *judge thereof*." (V. C. 1873, c. 165, § 4.)

The *county court* in term, or the judge thereof in *vacation*, has also "jurisdiction of writs of *mandamus* in all matters or proceedings arising from or appertaining to the action of the *board of supervisors* of the county, and the township or magisterial district boards of the counties for which such county courts are holden. (V. C. 1873, c. 165, § 4; Id. c. 154, § 19.)

The *corporation courts* are believed to have within their respective corporations, in respect to writs of *mandamus*, as in respect to other matters, the same jurisdiction as the *circuit courts*; but it is supposed that this jurisdiction must be exercised by the court *in term*, and not by the *judge in vacation*. (Va. Const. 1869, Art. VI, § 14; V. C. 1873, c. 154, § 38.)

The *court of appeals* also, is charged with authority to award writs of *mandamus* "to the *circuit and corporation courts*, and to the *hustings court*, and the *chancery*

court of the city of Richmond, and in *all other cases* in which it may be necessary to *prevent a failure of justice*, in which a mandamus may issue according to the principles of the common law. The practice and proceedings upon such writs shall be governed and regulated in all cases by the principles and practice now prevailing in respect to *writs of mandamus*." (Va. Const. 1869, Act VI, § 2; V. C. 1873, c. 156, § 4.)

2^d. The Proceedings in *Writs of Mandamus*, in Virginia.

The applicant for a *mandamus* presents to the court to which the application is made a petition verified by affidavit, setting forth the ground of the application. And thereupon, if a proper case be stated in the petition, a *rule* is made upon the party complained of to show cause why a writ of *mandamus* should not be awarded; or instead of a rule, there is granted a *mandamus nisi*, which has the same effect, commanding the person to whom it is addressed to do the thing required, *unless* he shall show cause to the contrary. (1 Rob. Pract. (1st ed.) 649; Morris' Case, 11 Grat. 297; Sights v. Yarnall, 12 Grat. 302; Cowan v. Doddridge, 22 Grat. 460.)

Where the *mandamus* is to affect other persons besides the party to whom it is addressed, notice of the rule, or *mandamus nisi*, should be given to such persons, in order that they may have an opportunity to protect their interests. Thus, if the intent of the writ is to procure the applicant to be admitted to an office, the incumbent of the office ought to be notified of the proceeding, not necessarily by a formal service of the rule, or *mandamus nisi*, but yet in such a way as to apprise him of what is sought; and this *the record ought to show*. (1 Rob. Pr. (1st ed.) 649; Dew v. Judges of Sweet Springs, 3 H. & M. 2, 29, 38.)

Upon the return of the *mandamus nisi* duly served, or, as it is apprehended, of the rule, (and because of the possible doubt on this point, it is better to resort to the *mandamus nisi*, which is certainly regular, rather than to the rule, Morris' Case, 11 Grat. 298; Sights v. Yarnall, 12 Grat. 302), the statute directs that the answer of the respondent "shall state plainly and concisely the matter of law or fact relied on in opposition to the complaint," and thereupon the complainant is allowed, by a much more direct and judicious procedure than was permitted at common law, "to demur to the return (*i. e.* the answer), or plead specially thereto, or both." And "the defendant may reply, take issue on, or demur to the pleas of the complainant." (V. C. 1873, c. 151, § 1, 2, 3.)

When the issue is joined, if it is on a *question of law*

arising upon a demurrer, it is determined by the court; if on a *question of fact*, it is decided by a jury; or on the other hand, judgment may go by default, as by *nil dicit*, or for want of a replication, or other pleading; and for all these contingencies the statute has made distinct provision. Thus it declares: If a verdict be found or judgment rendered for the person suing out the writ, on demurrer, or by *nil dicit*, or for want of a replication, or other pleading, he shall recover his costs, and such damages as the jury may assess, and final judgment thereupon shall be entered, and enforced by execution as in other cases; and a *peremptory mandamus* shall be awarded *without delay*, as if the return to the writ had been adjudged insufficient." Whilst, "if judgment be rendered for the defendant, he shall recover his costs." (V. C. 1873, c. 151, § 4, 5.)

3^d. The Cases where a *Writ of Mandamus* has been awarded in Virginia, and where Denied.

The common law regulates the cases where a writ of *mandamus* with us shall or shall not be awarded, the statute being silent on that subject. Hence, for the general principles governing the jurisdiction, reference must be had to the common law authorities, (See Bac. Abr. *Mandamus*, (C); Jac. Law Dict. *Mandamus*; Bouv. Law Dict. *Mandamus*); whilst the cases illustrating the principles will be taken chiefly from the Virginia reports.

It is characteristic of all the cases, that if the functionary whose conduct is complained of is by law to exercise *any discretion*, so that the act to be done is *not purely ministerial*, no *mandamus* can be awarded; for that would be to transfer the discretion which the law commits to the functionary, to the court which undertakes to award the writ. Thus, a *mandamus* cannot be granted to a county or corporation court to compel the *granting of a tavern license*, because that depends exclusively upon the discretion of such court, (*Ex-parte Yeager*, 11 Grat. 655; *Sights v. Yarnall*, 12 Grat. 292); nor to an accounting officer of the United States, whose duty it is to adjust accounts with, and claims on, the United States. (*Kendall v. Stokes*, 12 Pet. 524; *Decatur v. Paulding*, 14 Pet. 497; *Brashear v. Mason*, 6 How. 92; *U. S. v. Seaman*, 17 How. 230; *U. States v. Guthrie*, 17 How. 301.)

With this general preliminary observation we may proceed to consider—

(1), The cases where a writ of *mandamus* has been awarded in Virginia.

1. A *mandamus* has been awarded (but with questionable propriety) to compel a county court to erect a bridge across a stream on a public highway, and to construct a causeway, (*Brandon v. Chesterfield Justices*, 5 Call. 548; *Comm'th v. Kanawha Justices*, 2 Va. Cas. 499; *Comm'th v. Fairfax Justices*, 2 Va. Cas. 9); but not to compel it to open a new road, which upon a hearing of the cause it has already refused to open, the proper remedy being by *appeal or supersedeas*. (*Jones v. Stafford Justices*, 1 Leigh, 584.)

2. It has also been awarded to compel a county or corporation court, as a court of probate, to admit a *deed* to be proved and recorded according to law. (*Dawson v. Thurston*, 2 H. & M. 132; *Manns v. Givens & als.* 7 Leigh, 689; *Randolph Justices v. Stalnaker*, 13 Grat. 523.)

3. To *restore a clerk* of a court ousted from office by the illegal appointment of another person; (*Dew v. Judges of Sweet Springs Dist. Ct.* 3 H. & M. 1; *Smith v. Dyer*, 1 Call. 562); or to *restore a bank officer*, (*Booker v. Young*, 12 Grat. 303); but not to compel the visitors of a *private eleemosynary* institution to *restore an officer*; for such visitors, in the management of the institution, are governed only *by their own discretion*. (*Bracken v. Win. & Mary Coll.* 3 Call. 573.)

4. To compel a justice of the peace (under former laws), to *administer the oath of insolvency*, and to order the insolvent's discharge. (*Harrison v. Norfolk Justices*, 2 Leigh, 764.)

5. To compel a justice of the peace to *allow an appeal* from his decision where the party has a right to appeal. (*Ex-parte Morris*, 11 Grat. 292.)

6. To compel the county court to do what is required of it by law, touching *sales of land for taxes*. (*Delaney v. Goddin*, 12 Grat. 266.)

7. To compel a judge of an inferior court, to *sign a bill of exceptions*, probably. (*Taliaferro v. Franklin*, 1 Grat. 332, 336, 338; *Ex-parte Crane*, 5 Pet. 190.)

8. To compel a *flour-inspector* to inspect flour according to law, by boring into the head of the barrel with an *auger not exceeding a half an inch in diameter*. (*Dela-plane v. Crenshaw*, 15 Grat. 457.)

9. To compel a *circuit court judge* to hear and decide a cause which he is by law required to *hear and decide*. (*Cowan v. Doddridge*, 22 Grat. 458; *S. P. Cowan v. Fulton*, J. 23 Grat. 584 & seq; *Kent, &c. v. Dickinson*, J. 25 Grat. 817; *Ex-parte Yeager*, 11 Grat. 655, 663-'4; *Ex-parte Newman*, 14 Wal. 152; *King v. Justices of Kent*, 14 East. 395.)

10. To compel an inferior court to enter up a judgment *already pronounced*, and requiring nothing but to be formally entered. (*Ins. Co. v. Wilson*, 8 Pet. 291.)

11. To execute the mandate of the *supreme court* by entering judgment according to the terms of the mandate. (*Stafford v. Union Bank*, 17 How. 275. *Sibbald v. U. S.* 12 Pet. 492-'3; *Cowan v. Doddridge*, 22 Grat. 458; *Cowan v. Fulton*, J. 23 Grat. 584.)

12. To *reinstate a cause* erroneously dismissed (*Ex-parte Bradstreet*, 7 Pet. 634; *Cowan v. Doddridge*, 22 Grat. 458, &c.)

13. To *restore an attorney* illegally disbarred (*Ex-parte Bradley*, 7 Wal. 364; *Ex-parte Robinson*, 19 Wal. 513.)

14. To compel a municipal corporation *to levy taxes* to pay a debt ascertained and funded. (*City of Galena v. Army*. 5 Wal. 705.)

(2), Cases wherein a writ of *mandamus* has been *denied* in Virginia.

1. A writ of *mandamus* is not granted in Virginia to compel a circuit court to award a *supersedeas* to a judgment of a county court, the proper remedy being by *supersedeas* or appeal, and not by *mandamus*. (*Mayo v. Clark*, 2 Call. 276.)

2. Nor to the visitors of an *eleemosynary corporation* to compel the restoration of an officer, because that would be to invade the *supreme discretion* which belongs to the managers of such an institution. (*Bracken v. Wm. & Mary Coll.* 3 Call. 573.)

3. Nor to compel an inferior court *to hear and to determine* a cause where there has been *unreasonable delay*. (*Quære*, *Webb v. Barbour*, 4 H. & M. 462.)

4. Nor to do *any vain thing* which must by law be immediately *frustrated of effect*; *e. g.* to compel a county court to issue a *pluries attachment* against the body of a garnishee, who, upon the *alias*, has been liberated by a circuit court judge upon *habeas corpus*, (*Jackson v. Harrison Justices*, 1 Va. Cas. 314); to *admit a justice of the peace* who, by removal from the county *to reside*, has incurred a forfeiture of his office, (*Chew v. Spottsylvania Justices*, 2 Va. Cas. 208; *Poulson v. Accomack Justices*, 2 Leigh, 743), or who has incurred such forfeiture by *accepting an incompatible office*, such as deputy clerk. (*Amory v. Gloucester Justices*, 2 Va. Cas. 523.)

5. Nor to compel the county court to nominate to the governor, (as under the old system), any *particular justice* for sheriff, the nomination being in the *discretion* of the court. (*Frisbie v. Wythe Justices*, 2 Va. Cas. 92.)

6. Nor to compel the county court *to open a new road*

which, upon the hearing of the cause, the county court has refused to do, the proper remedy being *appeal or supersedeas*. (Jones v. Stafford Justices, 1 Leigh, 584.)

7. Nor to compel the county court to *levy a tax* to pay for a county bridge, where there is another remedy by action *against the justices individually*, who refused the levy. (King William Justices v. Munday, 2 Leigh, 165.)

8. Nor in any case where there is *another adequate remedy*, not obsolete; *e. g.* to set aside pleas improvidently allowed, the proper remedy being *supersedeas*, (*Ex-parte* Goolsby, 2 Grat. 575), to compel an inferior court to reverse a judgment *already pronounced*, which is the function of a *supersedeas or appeal*. (*Ex-parte* Newman, 14 Wal. 152.)

9. Nor in any case where the *manaamus* would infringe upon the *discretion accorded by the law* to the functionary; *e. g.* to compel the county court to grant *license to keep tavern*, which is exclusively in the discretion of the county court, (*Ex-parte* Yeager, 11 Grat. 655; Rights v. Yarnall, 12 Grat. 292), or to compel an accounting officer of the United States, charged by law with the duty of *settling accounts* and ascertaining balances, to make specific allowances, which depend on *his discretion*. (Kendall v. Stokes, 12 Pet. 524; Decatur v. Paulding, 14 Pet. 497; Brashear v. Mason, 6 How. 92; U. States v. Guthrie, 17 Pet. 301; U. S. v. Seaman, Id. 230.)

5°. All other Civil Injuries, not belonging to the Admiralty and Maritime Jurisdiction.

This comprehensive head embraces all *manner of actions at law* and *suits in equity*, and constitutes the great bulk of the litigation with which practitioners in general come in contact.

CHAPTER II.

REMEDIES FOR WRONGS, ESPECIALLY AT LAW AND EQUITY.

2°. Remedies for Wrongs, especially in the Courts of Common Law and Equity.

We are here to take notice of, (1), The general effect of the remedy afforded; (2), The actions or *formulae* of complaint employed to procure redress for injuries; (3), The general classification of wrongs, with a view to the remedies therefor (and chiefly in the courts of common law as opposed to equity); and (4), Limitations to remedies in point of time;

W. C.

SECTION I.

1^b. The General Effect of the Remedy Afforded; W. C.1^a. To give Specific Relief.

A court of law does not, for the most part, undertake to give a specific relief exactly adapted to the nature of the case, nor does the process which belongs to it afford the means to do so. There are, indeed, but three cases where a court of law, in practice, administers such specific relief, namely:

1st. By the *action of debt*, to compel the defendant to *pay a debt* specifically as he has promised either expressly or impliedly;

2nd. By the *action of detinue*, to compel the defendant to deliver up a *specific chattel* belonging to the plaintiff, which he withholds; and by such other remedies as enforce the restoration of a specific chattel to the owner, as at common law, the action of *replevin*, and by statute in Virginia, the proceeding by *interpleader*;

3rd. By the *action of ejectment*, to compel the defendant to restore the *specific tract of land* belonging to the plaintiff, which he unlawfully withholds; and by such other actions as are adapted to recover land, as the writ of *forcible or unlawful entry, &c.*

A court of equity, on the other hand, makes it its boast that it can and does give, in all cases where in the nature of things it is possible, a specific relief exactly adapted to the wrong complained of. Thus, where it is necessary to complete an effectual relief, it constrains a promisor *specifically to perform* his agreement as it was made; *e. g.* in case of a contract to sell land; and when irremediable damage would ensue from a wrong which is begun to be committed, or is threatened, it interposes by writ or order of *injunction* to prevent the injury from being done, or from being persisted in, *e. g.* in case of waste or nuisance. A court of law, in these cases, could only compensate the party *in damages*, which in many cases are signally inadequate and unsatisfactory.

2^a. To give *Damages in recompense* for the Injury done.

In very many cases this is the only mode of redress for a wrong which the nature of the case admits. A *tort*, if foreseen, may, be sometimes prevented; but when once it is perpetrated, the only legal amends possible must usually be found in pecuniary damages. In most cases of *contract broken*, damages constitute *the best*, and in many *the only* retribution practicable. But a court of law, save in those cases above mentioned, does not seek in general (some collateral processes excepted,) to give any other relief, whether

in cases of contract or of tort, than through the *medium of damages* assessed by a jury.

A man contracts in writing to sell you a house and lot. You pay him the price, and move into the house, and he then refuses to convey you the legal title. A court of law has no other redress to give you than such damages as a jury may assess for the breach of contract, which are commonly limited to the purchase money which has been paid, with or without interest, according as the purchaser has or has not been in possession. But a court of equity will compel the vendor to convey *according to the terms of the contract*. Again, in a malarious climate you find a man throwing a dike across a sluggish stream, and thereby damming up its waters and exposing your household to miasm, pretty sure to breed disease, and not improbably produce death. In a court of law you could not effectually prevent him from carrying on his disastrous enterprise, nor indeed prosecute *any remedy* against him until you had actually suffered from his wrong; and then the only remedy which would in general be administered to you, would be in the form of damages,—*damages* to compensate for the loss of a wife or a child! A court of equity, however, would arrest the nuisance at the outset, and effectually *prevent* the irreparable injury which would probably ensue from it. (2 Stor. Eq. § 926 & seq; Miller v. Trueheart, 4 Leigh, 569; Coalter v. Hunter, 4 Rand. 58; Pennsylvania v. Wheeling Bridge Co. 13 How. 518; Miss. & Mo. R. R. v. Ward, 2 Black, 485.)

SECTION II.

2^b. The *Actions or Formulæ* of Complaint employed to Procure Redress for Injuries; W. C.

1^a. The *Actions or Formulæ* of Complaint in a *Court of Equity*.

There are a few rules for the structure of bills, answers, pleas, and demurrers, and other pleadings used in the courts of chancery; and the parts of which such bills, answers, and other pleadings should consist are stated, but *no precise forms* are insisted on or provided. (Mitford's Eq. Pl. 41.)

2^c. The *Actions or Formulæ* of Complaint Employed in the Courts of Admiralty.

Precise forms are more closely pursued in the courts of admiralty than in the chancery courts, but are more loosely devised than in the courts of common law.

See 2 Abb. U. S. Pract. 371 & seq; 2 Pars. Ship. & Adm. 379-'80.

3^a. The *Actions or Formulæ* of Complaint in a Court of Law.

Rigorous precision characterizes the discrimination between the classes of actions at law; and the terms and phraseology of the allegations therein, which are prescribed for the most

part by the usage of centuries, must, or at least *ought*, to be observed, and not departed from. (3 Bl. Com. 116-'17.)

In order to understand clearly the nature of these actions or *formulæ* of complaint used in the courts of common law, and also to comprehend the allegations on both sides which follow the *complaint*, let us proceed to take notice of, (1), Some extraordinary statutory proceedings unknown to the common law, and recommended by the necessities of an advancing society, *e. g.*, by *attachment*, &c.; and (2), The several sorts of *ordinary actions* at common law;

W. C.

- 1^d. Certain Extraordinary Statutory Proceedings; *e. g.*, by *Attachment*; by *Interpleader*; and by *Forthcoming or Delivery Bond*.

See as to attachment, V. C. 1873, c. 148, § 1 & seq; Drake on Attachments; Daniel on Do.; as to interpleader, V. C. 1873, c. 149, § 2, 3, 6, 7; and as to forthcoming or delivery bond, V. C. 1873, c. 185, § 1, 2, 3, 4.

W. C.

- 1^o. Attachments.

Attachments constitute an extraordinary remedy, harsh towards the defendant himself, and harsh in its operation towards the other creditors of the defendant, over whom the attaching creditor obtains priority. It is liable to great abuse, and has often been greatly abused. The proceeding, therefore, is closely watched, and is never sustained unless all the requirements of the law have been complied with. (Claffin v. Steenbock, 18 Grat. 854.)

There are Five kinds of Attachment, namely: (1), Against a *non-resident debtor*; (2), Against an *absconding debtor in a suit*; (3), Against an *absconding debtor not in suit*; (4), Against a *lessee removing his property*; and (5), Against vessels for *materials, supplies, work done, &c.*

See Bart. Va. Pract. 301 & seq.);

W. C.

- 1^f. Attachment Against a *non-resident Debtor, &c.*, having Effects in Virginia.

This is a proceeding *properly in equity*, and originally prosecuted there. But as the proceeding of the law-courts is well adapted to ascertain the defendant's liability in many cases, and in most to reach the property belonging to the *non-resident*, the jurisdiction in causes cognizable at common law is transferred to the law courts, which, instead of proceeding as at common law they always do, *in personam*, or against the person of the debtor, are in these cases permitted by statute to proceed *in rem*, or against the subject or property upon which the attachment is levied.

The statute provides that: "Where any suit is instituted for *any debt*, or for damages for *breach of any con-*

tract, on *affidavit* stating the amount and justice of the claim, that there is present cause of action therefor, that the defendant, or one of the defendants, is not a resident of this State, and that the affiant believes he has estate, or debts due him *within the county or corporation* in which the suit is, or that he is sued with a defendant residing therein, the plaintiff may forthwith sue out of the clerk's office an *attachment* against the estate of the non-resident defendant for the amount as stated. (V.C. 1873, c. 148, § 1.)

Where the cause of the plaintiff is cognizable, *not at common law*, but *in equity*, this provision would seem to be in like manner applicable; so that, by the effect of the statute, if the cause is proper for common law cognizance, it is treated as a *common law cause*, and by the medium of the attachment the defendant's property is subjected; if it is proper *only for equity cognizance*, it is treated as a *cause in chancery*, and, as before, by the same medium of an attachment, the defendant's property is subjected. (Cirode v. Buchanan, 22 Grat. 214-'15.)

This seems to have been the theory of the revisors of the Code of 1849, (Revisor's Report, 757). But the very next year after the legislative approval of that view, manifested by adopting the statute recommended, an act was passed declaring that the same class of causes,—that is, "claims to any debt, or to damages for breach of any contract," or claims *in equity* to any money or property, against a non-resident, (Cirode v. Buchanan, 22 Grat. 213 & seq; Pulliam v. Aler, 15 Grat. 57, &c.,) might be maintained in a *court of equity*. (V. C. 1873, c. 148, § 11.) The effect is that a creditor having a legal claim against a non-resident debtor, may prosecute it by a foreign attachment suit, either at law or in equity. (Cirode v. Buchanan, 22 Grat. 215.)

The principles governing this proceeding, and the several steps of the proceeding itself, may be seen in Daniel on Attachments, 7 & seq. See also, Bart. Va. Pract. 301 & seq; Moore v. Holt, 10 Grat. 289-'90; Clark v. Ward, 12 Grat. 448.

- 2^d. Attachment against a *Defendant in any suit who is removing, or intends to remove, his effects out of the State, pending the Suit.*

"On affidavit, at the time of or after the institution of any *suit*, that the plaintiff's claim is believed to be just, and where the suit is to recover specific personal property, stating the nature, and according to the affiant's belief, the value of such property, and the probable amount of damages the plaintiff will recover for the detention thereof; or where it is to recover money for any claim, or for damages for any wrong, stating a certain sum which (at

the least), the affiant believes the plaintiff is entitled to, or ought to recover; and an affidavit also, that the affiant believes that the defendant is removing, or intends to remove, such specific property, or his own estate, or the proceeds of the sale of his property, or a material part of such estate or proceeds, *out of this State*, so that process of execution on a judgment in said suit, when it is obtained, will be unavailing, in any such case, the clerk shall issue an attachment as the case may require," for such an amount as will suffice to satisfy the plaintiff's demand, and where the suit is for specific property, including such property, unless the plaintiff shall prefer to attach for its value. (V. C. 1873, c. 148, § 2.)

See Spangler v. Davy, 15 Grat. 381; Claffin & Co. v. Steenbock, 18 Grat. 842; Wright v. Rambo, 22 Grat. 158; Rolls, Ass'ee v. Andes Ins. Co. 23 Grat. 509.

- 3f. Attachments against a Debtor, who *has removed, is removing, or intends to remove* his effects *out of this State*, *whether the claim be payable, (i. e. due) or not.*

"On complaint by any person, or his agent, to any justice, whether his claim is *payable or not*, that his *debtor* intends to remove, or is removing, or has removed his effects *out of this State*, so that there will probably not be therein sufficient effects of the debtor to satisfy the claim when judgment is obtained therefor, should only the ordinary process of the law be used to obtain such judgment, if such person or his agent make oath to the truth of such complaint, to the best of his belief, as well as to the amount and justice of his claim, and at what time the same is payable, the justice shall issue an attachment against the estate of the defendant for the amount so stated." (V. C. 1873, c. 148, § 3.)

This is a substitute for the attachment which formerly (prior to 1850,) our statutes allowed *against absconding debtors*. This provision applies not to debtors withdrawing *their persons*, but *their property*, from the commonwealth; and it applies only as against *debtors*, so that a claim for a *tort* cannot be the subject of such a proceeding. (Dunlop v. Keith, 1 Rand. 431.)

See Dan. Attachments, § 10, 67; Claffin v. Steenbock, 18 Grat. 842.

- 4f. Attachments *by Lessors, &c., against Tenants* who remove their effects *from the leased premises* before the rent is due.

"On complaint *by any lessor*, or his agent, to a justice, that any person *liable to him for rent*, intends to remove, or is removing, or has removed *his effects from the leased premises*; if such lessor, or his agent, make oath to the

truth of such complaint to the best of his belief, and to the rent which is reserved, (whether in money or other thing), and will be payable *within one year*, and the time or times when it will be so payable, and also make oath either that there *is not*, or he believes, unless an attachment issues, there *will not be left on such premises* property liable to distress sufficient to satisfy the rent so to become payable, such justice shall issue an attachment for the said rent against such goods as might be distrained for the same, if it had become payable, and against *any other estate* of the person so liable therefor." (V. C. 1873, c. 148, § 4.)

See Dan. Attachments, § 72 & seq.

5^t. Attachments *against Vessels* for *Materials, Supplies, Work done, Wharfage, &c.*

"If any person has any claim against the master or owner of any steamboat or other vessel, raft or river-craft, or against any steamboat or other vessel, raft or river-craft found within the jurisdiction of this State, for *materials or supplies* furnished or provided, or for *work done* for, in, or upon the same, or for *wharfage, pilotage, salvage*, or for *any contract* for the transportation of, or for *any injury done to any person* having charge of her, or in her employment, such person shall have a lien upon such steamboat or other vessel, raft or river-craft, for such materials or supplies furnished, work done or services rendered, from the date thereof, and may, either in a pending suit, or without the previous institution of any suit, sue out of the clerk's office of the court of the county, or the circuit court of the county, or of the court of the corporation, or of the circuit court of the corporation in which such steamboat or other vessel, raft or river-craft may be found, an attachment against such steamboat or other vessel, raft or river-craft, with all her tackle, apparel and furniture, or against the estate of such master or owner; and it shall not be necessary, in such attachment, to set forth *the name* of such master or owner." The order of publication may be against the owner or the master, &c. (V. C. 1873, c. 148, § 5; Acts, 1876-'7, p. 32, c. 44.)

So far as this provision of the statute proposes a proceeding *in rem*, that is, against the vessel or craft itself, and relates to *maritime contracts*, or to *torts* committed upon waters navigable for vessels employed in commerce, it is in conflict with the admiralty jurisdiction of the United States, which is vested *exclusively* in the district courts of the Union, and to that extent the provision is *void*. (The *Moses Taylor*, 4 Wal. 424 & seq; The *Hine*

v. Trevor, Id. 568-'9.) In the latter of these cases, Mr. Justice Miller, pronouncing the opinion of the court, gives a very clear statement of the progress of thought in the supreme court of the United States, touching the *locus in quo* of the admiralty cognizance under the constitution and laws of the United States, and sets forth with precision the doctrine applicable to State statutes which undertake to give remedies *in rem* in causes maritime.

See *post*, p. & seq; and especially *The Lottawanna*, 21 Wal. 558, 578, 581.)

2°. Interpleader.

It will be more convenient to expound the process of interpleader in connection with the ordinary actions. See *post*, p. 350.

3°. Forthcoming or Delivery Bond.

The explanation of the use of the forthcoming or delivery bond as a means of obtaining redress, is also reserved to be treated along with ordinary actions, *post*, p. 355.

2^d. The Several kinds of *Ordinary Actions at Law*.

The several kinds of ordinary actions at law may best be studied *by classes*, namely: (1), Real actions; (2), Personal actions; and (3), Mixed actions. (1 Bl. Com. 116 to 118; 1 Chit. Pl. Pl. 107 to 226; St. Pl. (ed. 45), 9 to 20; Id. (Tyler) 39 to 54);

W. C.

1°. Real Actions.

Real actions are such as are employed to recover *freehold estates* in lands, without regard to any damages for the detention of the same from the owner. If the action allows damages also to be recovered, as well as the land, it is denominated a *mixed action*. It cannot but strike the student with surprise that the law should not have allowed damages to be recovered in all cases, as well as the lands themselves, thereby avoiding a multiplicity of suits for substantially one subject-matter. The reasons for it are, in part, technical; but they are not unsatisfactory, although the inquirer may very reasonably be disposed, in the light of modern improvement and thought, to deem the technicalities which constitute the reasons for the doctrine in question entitled to very little of *our* respect. The reasons appear to have been the following, viz:

1. The reverend regard in which our English ancestors held *freehold estates*, which to them were the representatives of *all property*, so that they deemed an action whose principal object was to recover the *freehold*, not proper to be *degraded* to the purpose, infinitely less important in their eyes, of recovering monied compensation for the wrongful occupancy thereof;

2. The fact that *title to freehold* was, down to the

reign of Elizabeth, tried not very unfrequently by *wager of battel*, and long afterwards was liable to be so tried; and that mode of trial, absurd in any case, would have been conspicuously absurd as a mode of *estimating damages*;

3. The consideration that, even when the question of title was submitted to the *grand assize*, a jury composed of four knights and twelve citizens, the intelligence of the triers was not such as to make it desirable to burden them with the double duty of determining the title to land (often very nice and intricate), and at the same time of also ascertaining the damages incurred by withholding the possession;

4. The consideration, that as the public safety required that the tenant in possession, whether of right or wrongfully, should be compelled to render the military services due for the land to the superior, it was necessary to allow even a disseisor to retain so much of the profits as was needful to enable him to discharge this duty; and to make an apportionment, and oblige him to account for the surplus, involved too much collateral inquiry to be safely committed to the same jury which was charged with the determination of the title.

See 3 Bl. Com. 187; Id. 351.

Real actions are distributed into two classes, namely: (1), Possessory; and (2), Droiturel.

W. C.

1st. Possessory Actions.

Possessory actions are such real actions as are employed to recover the *possession* of *freehold* estates in lands, whereof the plaintiff (called in real actions the *demandant*) or his ancestors have been unjustly deprived, where they still retain a *right to the possession*, in contradistinction to a *mere right* to the lands. (3 Bl. Com. 179 to 190.)

This distinction between the *right to the possession* of lands and the *mere right of property* is explained, 2 Bl. Com. 196 & seq; and 2 Insts. Com. & Stat. Law, 500 & seq; W. C.

1st. Writ of Forcible Entry, Unlawful Entry, or Unlawful Detainer.

This is a *statutory* remedy designed to recover, in a very summary way, the *possession only* of lands, but without regard to the estate therein, when the possession has not been withheld more than *three years*. The style of the writ, it should be observed, varies with the character of the injury it proposes to redress. When the injury consists in an *entry into lands by force*, (which is *always illegal*, however perfect may be the enterer's title, and however wanting in title the party in possession may be,) the writ is a writ of *forcible entry*. Where the

injury consists in the wrong-doer's entering upon the lands where *entry is not given by law*, the writ is a writ of *unlawful entry*; and when the injury is the *unlawful withholding* of the possession by the wrong-doer, as in case of a tenant for years, &c., holding over after the expiration of his term, the writ is a writ of *unlawful detainer*. (V. C. 1873, c. 130, § 1 & seq; see Bac. Abr. Forc. Entry, &c.; Id. (A), &c.; 6 Rob. Pr. 785, &c., 838.)

2^d. Writ of Entry.

The writ of entry is employed at common law to recover the *possession of lands* where there is a *right to the possession*, whether the demandant has or has not in him the *mere right of property*.

The writ of entry proposes to assert the demandant's right by *disproving the title of the occupant*, and to do that by showing the unlawful means whereby he, or those under whom he claims, came into possession. Thus the demandant may maintain this remedy at common law against an *abator*, an *intruder*, or a *disseisor* claiming the land in question to be his *right and inheritance*, into which, as he insists, the occupant (*tenant* as he is technically styled,) had not entry but by (or after) an abatement, intrusion, or disseisin, made to the demandant within the time limited by law for such actions. The writ, after thus setting forth the demandant's claim, requires the *tenant* either to deliver seisin of the lands, or to show cause why he will not. The cause shown by the tenant may be either a denial of the fact of having entered by or under such means as the demandant has suggested, or a justification of his entry by reason of *title in himself*, or in those under whom he makes claim, whereupon the possession of the land is awarded to him who, at the trial, produces the clearest right to possess it. (3 Bl. Com. 180 & seq; Bac. Abr. Actions in General, (A).)

The writ of entry was *abolished* in Virginia by the Code of 1849, the action having long before been practically disused amongst us. (V. C. 1873. c. 131, § 38.)

3^d. Writ of Assize.

The writ of assize seems to have originated about 22 Hen. II, (A. D. 1176), in a statute which is not now extant; and was probably devised by Glanvil, who, during much of the reign of Henry II, was the *chief justiciary* of the realm. The writ was suggested by the harassing delays which obstructed the prosecution of writs of entry, after real actions were removed from the court of the lord (the *court baron*,) to that of the King at Westminster, (the court of common pleas,) and was designed to be a very speedy remedy, (*festinum remedium*), prose-

cuted and determined in the county where the *ouster* or dispossession from the land had occurred. To this end a royal commission is directed to be issued, whereby *twice every year*, certain judges are designated to hold *assizes* in every county, in order to inquire into and try any *abatement* or *disseisin* of land which may have happened in the counties respectively. The assizes were so denominated (from the latin *assidere*—to sit), because of the *sittings* of the jury employed to try such causes, involving of course the *sitting* of the judge also; but the jury being the central and most important element, and the judge only an auxiliary in the administration of justice, the latter is not regarded in giving the designation.

The scheme of the proceeding is to set the complaint on foot, and to try and determine it, and put the party aggrieved into possession, *at one and the same assizes*, or sittings; and in this respect it well deserved to be styled *festinum remedium*. In practice, however, it was seldom so speedy as this.

The writ of assize is founded not so much on the defects of the title of the occupant or *tenant*, as on *the goodness of the demandant's*. It is applicable exclusively to dispossession by *abatement*, (when the writ is denominated a "writ of assize of *mort d'ancestor*,") and by *disseisin* of the demandant himself, (in which case the writ is termed a "writ of assize of *novel disseisin*.") (3 Bl. Com. 184; Bac. Abr. Assize (A).)

The writ of assize is not used *in practice* in Virginia, but it is not abolished, and might still be employed if there were any adequate inducement therefor. The form of the writ for various cases is given by Glanvil (B. XIII. c. 111, p. 306, & seq), and by Fitzherbert, in his "*natura brevium*," (p. 433); and from those forms the nature of the action will be best understood.

2^d. Droiturel Actions.

A *droiturel* action is an action employed to regain the possession of lands and tenements where the demandant has lost not only *the possession*, but also the *right of possession*, and has nothing but the *mere right of property*. (2 Bl. Com. 195-199; 3 Do. 191; Bac. Abr. Actions in General, (A); 2 Insts. Com. & Stat. Law, 500, & seq.)

The most prominent *droiturel* actions at common law are as follows, namely: (1), The writ of *quod ei deforcat*; (2), The writ of *right of dower*; (3), The writ of *formedon*; and (4), The writ of right;

W. C.

1st. The Writ of *Quod ei Deforcat*.

The writ of *quod ei deforcat* is proper to be employed when *tenant for life* especially (although it is applicable

also to *tenant in tail*), has lost the *right of possession*, (e. g. by suffering judgment to go against him *by default in a possessory action*), and retains nothing but the *mere right of property*. The writ was given by Stat. 13 Edw. I, c. 4, (3 Bl. Com. 191, 193,) and, therefore, is saved to us by our statute, (V. C. 1873, c. 15, § 2,) reserving for the use of our people all *remedial and judicial writs* given by any act of parliament prior to 4 Jac. I, not local to England, nor repealed here.

2^d. Writ of Right of Dower.

The *writ of right of dower* is employed to recover a widow's dower, whereof she is *deforced*, where a part of her dower in *the same tract* has been already assigned to her. (3 Bl. Com. 183.)

As this action, although demanding only a life-estate, is said to be of the same nature as the "grand writ of right," (3 Bl. Com. 183), it may perhaps be considered as abolished along with the latter writ in Virginia, (V. C. 1873, c. 131, § 38.) The conjecture, however, is not likely to be brought to judicial arbitrament, this remedy for the recovery of a widow's dower having been for more than a century superseded in practice, as well in England as with us, by a *bill in chancery*. (1 Stor. Eq. § 624 & seq.)

This jurisdiction of the court of chancery to assign dower, *originated* in the various embarrassments which often obstructed a widow's recovery of her dower in a court of law, in consequence of her ignorance of the state of her husband's title to the lands of which he was seised, (the title-papers being in England in the hands of the heir, or of the devisee or trustee,) and also in consequence of the difficulty of ascertaining the comparative value of the husband's different tracts, &c.; but the ultimate result is, that the courts of equity now entertain a general concurrent jurisdiction with courts of law, in the assignment of dower, *in all cases* where the legal title of the husband is not disputed; but if the title is disputed, it is first required to be established by an issue at law, or otherwise. (1 Stor. Eq. § 624.) And this intervention of the courts of equity has received with us the direct sanction of the legislature, (V. C. 1873, c. 106, § 10); which has moreover allowed the widow to recover her dower, and damages for its being withheld, by such remedy at law as would lie on *behalf of a tenant for life having a right of entry*. (V. C. 1873, c. 106, § 10); as for example, *by ejectment*, in which provision is made for the assignment of dower by commissioners appointed for the purpose. (V. C. 1873, c. 131, § 29, 6, 7 & seq.)

Seeing, then, that the widow may have the benefit of these two remedies to recover her dower, and damages for its being withheld,—both remedies more advantageous to her than the writ of right of dower,—it is not probable that the question whether the latter writ has not been abolished will be ever judicially solved.

3^d. Writ of *Formedon*.

The writ of *formedon* is a *droiturel action*, adapted to recover real property in pursuance of a gift in tail, (*per formam doni*), where by the wrongful alienation in fee simple, of the tenant in tail, the estate-tail is discontinued, and the remainder or reversion, or the interest of the issue in tail, is turned into a mere right. If the writ of *formedon* is prosecuted by the issue in tail, it is denominated *formedon in descender*; and if by him in remainder, or in reversion, it is styled *formedon in remainder*, or *formedon in reverter*. (8 Bl. Com. 191-'2.)

This writ is expressly abolished in Virginia by statute of 1850, (V. C. 1873, c. 131, § 38); although in fact it had been, in the main, done away with long before, in consequence of the abolition of estates-tail, on the 7th of October, 1776. (V. C. 1873, c. 112, § 9.)

In the case of *Orndoff v. Turman*, 2 Leigh, 200, 220 & seq., a writ of *formedon in descender* was held to have been properly brought subsequent to 1816, although upon the merits, it was decided against the demandant; and in that case, in 1830, it became needful for counsel and judges to go deep into the ancient learning of the law upon the subject of estates-tail, discontinuances of estates-tail, writs of *formedon*, &c.

4^d. Writ of Right.

The writ of right is employed to recover, not an estate for life, like a writ of *quod ei deforceat*, nor an estate-tail, like a writ of *formedon*, but an estate in fee-simple, where the right of possession is barred by a recovery on the merits in a possessory action, or by the lapse of time. (8 Bl. Com. 393.)

The writ of right, after having been much simplified by statute, and pruned of all its inconvenient incidents and sources of delay, so that it had become the most frequent remedy for the recovery of lands in that portion of the commonwealth lying west of the Blue-ridge, was, by the code of 1849, entirely abolished, (V. C. 1873, c. 131, § 38); having fallen a victim to the traditional prejudice prevailing against it in its unreformed state, and to the practical ignorance, in the larger portion of the commonwealth, of its convenient and easy working. See 1 Rob. Pr. (1st ed.), 464 & seq.

The statute which abolished it, however, substituted

ejectment in its place, declaring that ejectment might be "brought in the same cases in which a writ of right may now be brought, and by any person claiming real estate *in fee, or for life, or for years*, either as heir, devisee, or purchaser, or otherwise." (V. C. 1843, c. 131, § 2.)

Ejectment with us is, therefore, installed as the common remedy whereby to recover *any interest* whatsoever in lands; whereas the common law, with superfluous discrimination, provided a distinct remedy for each several *freehold estate*, namely: *for life in fee-tail* and in *fee-simple*.

2°. Personal Actions.

Personal actions are of that class of actions employed to *recover money* (whether in the shape of *debt or damages*), or *other chattels*. (3 Bl. Com. 117; 1 Chit. Pl. 10.)

They are of two classes,—designed to redress an injury arising from *breach of contract*, in which case they are said to be *ex contractu*, or to obtain amends for a *tort*, which, it will be remembered, means *any injury other than a breach of contract*; and actions of this class are said to be *ex delicto*; W. C.

1°. Actions *ex Contractu*.

Actions *ex contractu* are founded, as we have just seen, on a *breach of contract express or implied*, and are intended to redress the injury thence arising. (1 Chit. Pl. 111.)

The actions *ex contractu* may be enumerated as follows, viz: (1), Debt; (2), Covenant; (3), Account, or as it is spelled in the older books, *accoupt*; and (4), Trespass on the case in *assumpsit, or upon promises*;

W. C.

1°. Action of Debt.

The action of *debt* is employed to recover a *debt, eo nomine*, and *in numero*; that is, a *specific sum of money* due *by contract*, express or implied, together with damages (generally *nominal*), for its detention. (1 Chit. Pl. 123; 3 Rob. Pract. (2d ed.) 370, 358.)

2°. Action of Covenant.

The action of *covenant* is employed to recover damages sufficient to make amends for a *breach of covenant*; that is, of a contract *under seal*. The covenant may be *to pay money* or *to do a collateral thing*. If it is *to pay money*, the damages which the covenantee is entitled to recover, by way of compensation or amends for the breach, is *the money* covenanted to be paid, with interest from the time when it ought to have been paid. Where the covenant is *not to pay money*, but *to do some collateral thing*, there is no uniform standard of damages, but they must be estimated by a jury, according to the circumstances of each case. Where the covenant is *to pay*

money, it is obvious that the action of debt and the action of covenant are *concurrent remedies*, and may either of them be resorted to. Thus, in the case of a common *money-bond*, the action of *debt* will lie, because it is a promise to pay a *specific sum of money*, and the action of *covenant* may be brought because it is a *contract under seal*. The amount recovered in either action is the same; but there is a difference in the light in which the transaction is regarded in reference to the two actions respectively. When *debt* is brought, the plaintiff demands the specific sum *eo numero*, which the defendant engaged to pay, and he recovers accordingly. When the action is *covenant*, the plaintiff complains that the defendant, having made a very solemn promise *under his seal*, has recklessly violated it, whereby the complainant has suffered damage to an amount which he names, and which a jury must be called to assess, although, as we have seen, the invariable criterion of amount in *practice* is the sum which the defendant ought to have paid.

See 3 Bl. Com. 155; St. Pl. 16; Id. (Tyler), 46-'7; 1 Chit. Pl. 131; 3 Rob. Pr. (2d ed.) 362.

3^d. Action of Account, or *Accompt*.

The action of account is employed to adjust and settle *mutual accounts*, where there is a *privity between the parties*, either in *fact*, (as in the case of partners, or of bailiffs, and receivers, and principals, &c.), or in *law*, as in the case of guardian in socage and ward; and to *recover the balance* ascertained to be due. The settlement of the account is made before *auditors* appointed by the court, who, however, cannot determine even provisionally any controverted matter of fact or of law, but must refer the same to the court to be decided, if a matter of *fact* by a jury, and if a matter of *law*, by the judge, whereby the proceedings are intolerably protracted. (3 Bl. Com. 162-'3; 1 Chit. Pl. 44; 3 Rob. Pr. (2d ed.) 410; Bac. Abr. Accompt, (A); 3 Th. Co. Lit. 346-'7, n's (15), (16), (P); Godfrey v. Sanders, 3 Wils. 94, 98.)

In practice, the *bill in chancery* has quite superseded the action of account, being not only applicable wherever the *accounts are mutual*, (although there be no *privity* between the parties), and in all equitable claims arising out of trusts, and, therefore, in a wider range of cases than the action at law, but being also a much more speedy and effective remedy. (3 Bl. Com. 163; Ad. Eq. 222; 1 Stor. Eq. § 442 & seq.)

4th. Trespass on the Case in *Assumpsit*.

At a very early period specific forms of action were

provided for such injuries as had then most usually occurred, as was also the custom in the Greek and Roman jurisprudence; and Bracton, observing on the original writs on which the various actions known to the common law were founded, declares them to be fixed and immutable, unless by authority of parliament. These ancient forms, which had from time to time been collected and preserved in chancery, (the *officina justitiæ*) in a book called the *Register of Writs*, were, in the reign of Henry VIII, first printed in the book termed *Registrum Brevium*, on which Fitzherbert's *Natura Brevium* is a comment. (3 Bl. Com. 117; 1 Ohit. Pl. 107-'8.)

At common law also, besides these registered writs, the plaintiff seems to have been at liberty, if he found in the register no writ adapted to his case, to frame one *specially suited to his complaint*, and these writs were termed *magistralia*; but as the officers of the court of chancery, whose duty it was to prepare such new writs for the plaintiff's solicitor, were found reluctant in new cases to frame the proper remedy, or perhaps because their authority to do so had become doubtful, the legislature thought fit to enforce the common law, and it was enacted by statute Westm. II, (13 Edw. I, Stat. 1, c. 24,) "that if it shall fortune in the chancery that in one case a writ is found, and in like case (*in consimili casu*,) falling under the like law, and requiring like remedy, is found none, the clerks of the chancery shall agree in making the writ, or adjourn the complaint until the next parliament." This statute, coming thus timely to the aid of the common law, was speedily followed by a copious production of new forms of writs, which fell under the denomination of writs *transgressionis super casum*; that is, of *trespass*, (in the general sense of *wrong*,) *on the case*. (3 Bl. Com. 183; 4 Reeves' Hist. Eng. Law, 426, 432, 430; St. Pl. 7, 17-'8; Id. (Tyler,) 42, 48-'9.)

These new writs easily adapted themselves to the general division of personal actions already adverted to, some being *ex contractu*, and others *ex delicto*. The writs of trespass on the case *ex contractu*, speedily assumed the designation of actions (or writs) of trespass on the case *in assumpsit*, or as it is sometimes expressed with us, *on promises*; whilst in cases *ex delicto*, the actions (or writs) of the corresponding character were, and still continue to be, known as simply actions of *trespass on the case*. Still further to discriminate the two classes of new actions thus springing from 13 Edw. I, Stat. 1, c. 24, it is customary to call the action *ex contractu* "*assumpsit*," and

to apply the word "case," or "trespass on the case," to an action for a *tort*, and in form *ex delicto*. (1 Chit. Pl. 112.)

The action of *assumpsit* is employed to recover damages by way of amends for a breach of contract *not under seal*. It is, therefore, in most particulars, the counterpart of the action of *covenant*; *covenant* being applicable to contracts *under seal*, and *assumpsit* to those *not under seal*. Hence, as *covenant* and debt are concurrent remedies where the promise is to *pay money*, and is under the *promisor's seal*, so *assumpsit* and debt are concurrent remedies where the promise is to *pay money*, and is *not under seal*. It will be observed, that as *assumpsit* lies on all promises *not under seal*, it may be as well founded on a *promise implied*, as on one *expressed*, and on a promise to do a *collateral thing*, as on a promise to *pay money*. (1 Chit. Pl. 111 & seq; 3 Bl. Com. 157; St. Pl. 18; Id. (Tyler,) 49, 50; 3 Rob. Pr. (2nd ed.) 389; Bac. Abr. *Assumpsit*, (C).)

2^d. Actions *ex Delicto*.

Actions *ex delicto* are founded on and designed to obtain redress for *torts*, that is, for wrongs which do not proceed from the *breach of any contract*, express or implied. (1 Chit. Pl. 111.)

Besides the several actions *ex delicto* which are known to the common law, there are two statutory proceedings in Virginia, which to all intents and purposes are *actions*, although marked by certain eccentricities, which for the most part the common law avoids. These proceedings, or statutory actions, are awkward and imperfect substitutes for the action of *replevin*, which unfortunately has been abolished. They are proceedings by way of *interpleader*, in case of any illegal *judicial* taking of chattels, as by execution or warrant of distress, when the complaint is made by some one other than the *defendant*, and by way of *delivery-bond* where the *tenant* complains of an *illegal distress for rent*.

The actions *ex delicto*, therefore, may be enumerated as follows: namely, (1), *Detinue*; (2), *Replevin*; (3), *Interpleader*; (4), Proceeding by way of *delivery-bond*; (5), *Trespass vi et armis*; and (6), *Trespass on the case*; W. C.

1st. Action of *Detinue*.

The action of *detinue* is employed to regain the possession of a *specific chattel*, unlawfully *withheld*; or in case that should prove impracticable, to recover in the alternative its fair value, together, in either case, with *damages for its detention*. (3 Bl. Com. 151; St. Pl. 16; Id. (Ty-

ler), 47; 1 Chit. Pl. 137; 3 Rob. Pr. (2d ed.) 467). And in addition to an attachment where it appears that the defendant is removing, or intends to remove the chattel, or a material part of his own estate, *out of the commonwealth*, (V. C. 1873, c. 148, § 2; *Post* p.), provision is also made whereby, if it appears that the defendant is *insolvent*, and that the property sued for will be *sold, removed, secreted, or otherwise disposed of*, so as not to be forthcoming to answer the final judgment; or will be destroyed or materially injured by neglect, abuse, or otherwise, if left in the defendant's possession, process is issued commanding the officer to seize and keep the property until the suit is decided; unless the defendant replevy it by means of a bond conditioned to pay all damages sustained by reason of the return of the property to him, and also to have it forthcoming to answer the judgment of the court; or unless the property be perishable or expensive to keep, when it may be sold by order of court. (Acts 1874, p. 255, c. 222.)

2^d. Action of Replevin.

The action of replevin is an extremely beneficial remedy, employed at common law in order to regain the possession of a *specific chattel* unlawfully *taken*, together with damages for the taking and detaining. It restores the possession of the chattel to the party aggrieved, not at the end of the suit, as in *detinue*, but *at the beginning*, as soon as complaint is made, exacting, however, from the plaintiff, before he can have the benefit of the writ, that he shall give bond with good security, conditioned to "perform and satisfy the judgment of the court in the suit" which the writ institutes, "in case he shall be cast therein." (Rob. Forms, 384.)

The student will observe, that whilst replevin is appropriate only where the *taking* is unlawful, *detinue* lies wherever the chattel is *unlawfully withheld*, that is, not only in case of unlawful *taking* (for if the taking be unlawful, the detaining must be so likewise), but also, when the wrong-doer came lawfully into possession, but *continues to detain* after his right has ceased.

The action of replevin is at common law much used in case of *illegal distress*, as well by the tenant who is distrained upon, as by a third person who asserts a claim to the property taken. Indeed, Blackstone considers the action confined to an unlawful taking by way of distress, (3 Bl. Com. 145); but in this he is clearly mistaken, as Lord Redesdale points out in 1 Sch. & Lefroy, 327;

See Vin. Abr. Replevin, B. and C. Com. Dig. Replevin; 1 Bl. Com. 145, n. (1.)

But the legislature of Virginia, in 1823, unfortunately limited replevin by statute to unlawful taking *by distress for rent*, and in 1850, still more unfortunately, as the writer thinks, *abolished it*. (V. C. 1873, c. 145, § 4); proposing in its stead the inadequate substitutes of *interpleader*, (V. C. 1873, c. 149, § 2, 3, 6, 7,) and the proceeding by way of *delivery bond*. (V. C. 1873, c. 185, § 4.)

See 3 Bl. Com. 145 & seq; and n. (1); St. Pl. 19; Id. (Tyler) 52; 1 Chit. Pl. 190; Rob. Forms, 127; 3 Rob. Pr. (2d. ed.) 471.)

3^a. Proceeding by *Interpleader*.

The process of *interpleader*, in the aspect in which it is now to be viewed, is purely *statutory*, and everything in relation to it must be determined by reference to the statute. (V. C. 1873. c. 149, § 2, 3, 6, 7.)

The name, and somewhat of the idea of *interpleader* were derived from the courts of chancery, where *bills of interpleader* have been for ages one of the remedial agencies employed. It is resorted to in equity, where one in the position of a *stake-holder*, having himself no claim to the subject, finds himself embarrassed by conflicting pretensions thereto. He is allowed thereupon to file his bill in chancery, asking that court to compel the parties to litigate and assert their respective claims before the court, (which is denominated *inter-pleading*) so that their rights may be settled by the decree of the court, and they be enjoined from harassing the plaintiff in the bill with any litigation touching the subject-matter which the plaintiff proposes to bring into court, to be disposed of as the court shall adjudge and decree. In order to exclude collusion between the stake-holder and either of the parties, whereby, for delay or some other illicit purpose, the jurisdiction of the court might be abused, the plaintiff is required to accompany his bill with an affidavit that there is no such collusion; and where the subject-matter is *money*, he must expressly offer in his bill to bring the same into court. (Bart. Suit in Eq. 68-'9; 2 Stor. Eq. § 801 & seq; Mitf. Eq. Plead. 32, 47, 125-'6.)

The remedy by *interpleader* is not wholly unknown to the common law; but it has a very narrow range of purpose and application, being confined to cases of *joint bailment* of a chattel, when the bailees afterwards demand it *severally*, by actions of *detinue*. The depository might plead the facts of the case, and pray that the plaintiffs in the several actions *might inter-plead*

with each other. (Mitf. Eq. Pl. 125; 3 Reeve's Hist. Eng. Law, 250 & seq.) There is also at common law, a process somewhat akin to interpleader, and known as the process of *garnishment*. That too, is applicable only to the action of *detinue*, where a *joint-bailment* has been made to the depositary, and then *one of the bailees* sues him for the thing thus bailed. The depositary, if he confesses the possession of the chattel, may have a writ of *scire facias* to *garnish* (i. e. to *summon or warn*), the other joint-bailee to become a defendant to the suit in his stead, which accomplishes the same result as an interpleader. (2 Stor. Eq. § 801-'2; 3 Reeve's Hist. Eng. Law, 448 & seq.)

It may be as well to say here, that the word *garnishment* (from Fr. *garnir*, to summon, or warn, and sometimes to furnish, subst. *garnissement*), means a warning or summons to one not originally a party to the cause, to appear and *furnish* the court with certain *information*, or with the *needful parties*, so that it may more advantageously determine the cause. And so *garnishee*, a word so familiar in connexion with *attachments* of the several sorts, means *one summoned, &c.* (Burrill's Law Dict: Garnishment; Bac. Abr. Garnishment, &c., Pl. 1, 5, 8, &c.; Bouv. Law Dict. Garnishment.)

It will now be desirable to pursue this statutory *interpleader*, which, as we have seen, was devised by the code of 1849, as a substitute for *replevin* (which that code abolished), into such detail as to give the student a pretty clear idea of its application, and of the mode of proceeding therein. To that end let us consider, (1), In *what cases* interpleader is available; (2), For *what persons* interpleader is available; (3), The *mode of obtaining* the process of interpleader; and (4), The *modes of securing the rights* of the parties pending the process; W. C.

1^h. In *what cases* the Process of *Interpleader* is Available.

Looking to the statute for this, as for every other particular connected with the subject, we find that the process is available in case only of *unlawful taking* under a warrant of distress or execution. "When property of the value of *more than* \$20 is taken under a warrant of distress, or an execution issued by a justice, or when property of *any value* is taken under an execution issued by the clerk of a court, and any person other than the party against whom the process issued claims such property, or the proceeds or value thereof, the circuit court, or the court of the county or corporation in which the property is taken, or the judge of such

circuit court in vacation," on application of the proper party, may issue the process of interpleader. (V. C. 1873, c. 149, § 2.) And "when an execution on a judgment of a justice, or a warrant of distress, is levied upon property *not of greater value than \$20*, which is claimed by any person other than the party against whom it is issued, such person may apply to a justice of the county or corporation in which the levy is" for a similar process of interpleader. (V. C. 1873, c. 147, § 14.)

2^h. For *what Persons* the process of interpleader is available.

The process of interpleader, where it is issued by a *court of record*, may be awarded upon the application of the *officer*, where no *indemnifying bond* has been given; or if one has been given, on the application of the *claimant* of the property, who has given a *suspending bond*, conditioned to pay all damages arising from a suspension of the sale, (V. C. 1873, c. 149, § 2, 6); or on the application of the *party suing out such process*; and when the process is issued by a justice, on the application of the *claimant only*. (V. C. 1873, c. 149, § 3; Id. c. 147, § 14.)

3^h. The *Mode of Obtaining* the Process of *Interpleader*.

The process of interpleader is awarded, as we have seen, in most cases, by the circuit, county, or corporation court of the county, or corporation in which the property is taken, or by the judge of the *circuit court* in vacation, (V. C. 1873, c. 149, § 2; *Supra*, p. 351). But in case of an execution on a judgment of a justice, or a warrant of distress, being levied upon "*property not of greater value than twenty dollars*," the process is awarded by a justice of the peace of the county or corporation in which the levy is. (V. C. 1873, c. 147, § 14; *Supra*.)

The application for the process should be *in writing*, and although not in terms required to be supported by affidavit; yet, inasmuch as it asks of the court or judge *ex-parte* action, which may more or less obstruct the regular execution of the court's previous sentence, it is certainly safer to append an affidavit. The application ought to state the fact of the process of execution or distress having been issued and levied; of the dispute or doubt having arisen in respect to the title to the property seized; and if the claimant of the property is the applicant, of the execution in due form of law of a *suspending bond*, and ought to conclude with a prayer that the court or judge will cause to appear *before the*

court, as well the party issuing the process of execution or distress, as the party making the claim, and will oblige them to *interplead*, and litigate their respective titles, and will settle and decide their several rights.

The "process of interpleader" is in the form of an *order* from the court or judge, (in the former case, attested by the clerk), reciting the complaint, and ordering the parties to be summoned to appear at the *next term of the court*, then to interplead and to litigate their respective rights, according to the prayer of the petition.

And when, at the next term of the court, the parties convene, in pursuance of this order or summons, the court may exercise, for the decision of their rights, all or any of the powers and authority prescribed in connexion with a *bill of interpleader in equity*; that is, it may cause such issue or issues to be tried as it may prescribe, and may direct which party shall be considered the plaintiff in the issues, and shall give judgment upon the verdict rendered on such trial, or if a jury be waived by the parties interested, shall itself determine their claims in a summary way. (V. C. 1873, c. 149, § 2, 3, 1, 6, 7.)

4^b. The modes of *Securing the Rights* of the Parties, pending the Process of Interpleader.

The parties whose rights require to be protected are the *creditor*, whose debt may be jeopardized by the suspension of proceedings on his execution or distress-warrant, and the *claimant*, who would naturally wish, if possible, to have the property *immediately* restored to the possession whence it was, as he insists, wrongfully taken. Let us see, then, what provision the statute makes to secure the respective rights of these two parties;

W. C.

1^a. Mode of protecting the *Rights of the Creditor*, pending the Process of Interpleader.

The statute requires a *suspending bond*, with good security, in a penalty equal to *double the value of the property*, to be executed by the claimant, payable to the officer, and conditioned to pay to all persons who may be injured by suspending the sale thereof until the claim thereto can be adjusted, such damages as they may sustain by such suspension; and until such suspending bond is executed, no application for process of interpleader can be heard. (V. C. 1873, c. 149, § 6, 2.)

When the sheriff or the creditor applies for the in-

terpleader there is of course no need of any such bond.

It will be observed, that the sheriff can only obtain the interpleader "where *no indemnifying bond*, has been given." (*Ante*, p. 352, 2^d.) An indemnifying bond is a bond which an officer levying, or required to levy, process of execution or distress, is allowed by law to exact from the creditor when *a doubt shall arise* whether the property in question is liable to such levy. The bond is to be with good security, payable *to the officer* in a penalty equal to *double the value* of the property, conditioned, (1), To *indemnify the officer* against all damages which he may sustain in consequence of the *seizure or sale* of said property; (2), To pay to *any claimant* of the property all damages which he may sustain in consequence of the *seizure or sale* thereof; and (3), To *warrant and defend* to any purchaser of the property such estate or interest therein as is sold. And if such indemnifying bond be not given within a reasonable time after notice that it is required, the officer may refuse to levy on the property, or may restore it; and if, on the other hand, the bond is given, the sale proceeds. (V. C. 1873, c. 149, § 4, 5.) From this account of an indemnifying bond it will be apparent why the officer cannot avail himself of process of interpleader, unless "where no indemnifying bond has been given;" for in that case he is obliged to levy and sell *at all events*, and is virtually (if he does his duty) discharged from all liability, and has therefore no interest in inquiring as to the title.

2^d Mode of Protecting the Rights of the *Claimant of the Property*.

The claimant may execute a forthcoming or delivery bond, (if the case be not one in which such a bond is prohibited by statute, V. C. 1873, c. 135, § 6,) with good security, payable *to the creditor or the landlord*, and conditioned that the property shall be forthcoming at such day and place of sale as shall be thereafter lawfully appointed; whereupon the property may be permitted to remain, *at the risk* of such claimant, in such possession as it was in immediately before the levy, according to the law touching delivery bonds. (V. C. 1873, c. 185, § 2, 3, 5, 6; *Id.* c. 149, § 7.)

4th. Proceeding by Delivery or Forthcoming Bond.

This proceeding is available for the *tenant alone*, in case of *distress* alleged by him to be illegal in whole or in part.

The tenant in such case executes a forthcoming or delivery bond, with good security, payable to the creditor or landlord, and with condition to have the property forthcoming at the day and place of sale. He then makes default in the delivery of the property, and when the creditor proceeds, according to law, (V. C. 1873, c. 185, § 1, 2, 3,) by action or motion on such bond, for *award of execution*, the *tenant* is allowed to appear and "make defence, on the ground that the distress was for rent *not due, in whole or in part, or was otherwise illegal.*" (V. C. 1873, c. 185, § 4.)

And under this statute the defendant (the *tenant*) may show that he is entitled to a *set-off*, or counter demand against the landlord; for to the extent of such counter demand the rent claimed is *not due*. (Allen & als v. Hart, 18 Grat. 722.)

5^s. Action of Trespass *vi et Armis*.

The action of trespass *vi et armis*, or of trespass, as it is commonly called, is employed to recover damages for injuries *to person or to property* which result *directly* from *force applied* (whether of purpose or for want of care), by the wrong-doer. (3 Bl. Com. 153; St. Pl. 16; Id. (Tyler), 47-8; 1 Chit. Pl. 142; 3 Rob. Pr. (2d ed.) 426; Winslow v. Beal, 6 Call. 44; Taylor v. Rainbow, 2 H. & M. 423; Cleek v. Haines, 2 Rand. 440; Jordan v. Wyatt, 4 Grat. 151; Percival v. Hickey, 18 Johns. (N. Y.) 257; Leame v. Bray, 3 East. 593.)

The later English authorities, however, favor the conclusion, that although the injury results *immediately* from the force applied by the defendant, yet if it result from the defendant's *negligence*, and not from design, *trespass on the case* will lie as well as *trespass*. (Moreton v. Hardern & als, 4 B. & Cr. (10 E. C. L.), 223; Williams v. Holland, 10 Bingh. (25 E. C. L.), 112.)

6^s. Action of *Trespass on the Case*.

The origin and nature of actions of *trespass on the case* have been already indicated, (*ante*, p. 347, &c). It will be remembered that they were there distributed very naturally into actions *ex contractu*, (to which the generic name of *trespass on the case in assumpsit* was assigned), and actions *ex delicto*, which are commonly distinguished by the designation *case* simply. One is said *upon promises*, to sue *in assumpsit*, and *upon torts* not accompanied by force (at common law), to sue *in case*.

The action of trespass on the case is at *common law* properly applicable to recover damages for injuries to person or property which do not result *immediately* from *force applied* by the wrong doer, without reference to

the question whether the force was of purpose, or by accident occasioned by negligence. (1 Chit. Pl. 151, 142; 3 Rob. Pr. 426; Cases cited *supra*, p. 355, 5^s.)

But the undesirableness of a distinction so nice between the two actions of trespass and trespass on the case, as in England, it has led the *courts* to modify the rigor of the doctrine by construction, as we have seen, (*Supra*, p. 355, 5^s; *Moreton v. Hardern*, 4 B. & Cr. (10 E. C. L.), 223; *Williams v. Holland*, 10 Bingham (25 E. C. L.), 112), so, with more propriety, it has induced our legislature to enact that "In any case in which an action of trespass will lie, there may be maintained an action of trespass on the case." (V. C. 1873, c. 145, § 6). And this statute has been construed by the court of appeals to admit of *counts in case* being joined in the same declaration with *counts in trespass*, wherever counts in trespass are proper. (*Parsons v. Harper*, 16 Grat. 72.)

It will be observed, that the distinction between the two actions is not wholly abolished. The action of trespass is left as at common law, and cannot therefore be maintained except where the injury results *directly from the force* applied by the wrong-doer. The statute relates only to the action of trespass *on the case*, allowing it to be brought wherever *trespass will lie*.

See 3 Rob. Pr. (2d ed.) 436-'7.

Whilst the action of trespass on the case is at common law characterized by the uniform trait of being designed to recover damages for an injury which *does not result directly from force* applied by the wrong-doer, it is expedient, for the sake of greater distinctness of view, to discriminate between trespass on the case generally, and trespass on the case under special circumstances, to which specific names have been given, as in *trover and conversion*, in *slander* and in *libel*;

W. C.

1^h. Trespass on the Case generally.

e. g. For fraud, for neglect, for malicious prosecution, &c. (3 Bl. Com. 153, 166; St. Pl. 17; Id. (Tyler), 49, &c.; 1 Chit. Pl. 151.)

2^h. Trespass on the Case in *Trover and Conversion*.

The action of trespass on the case in *trover and conversion*, (or as it is customary to denominate it, the action of *trover*), is employed in order to recover the money-value, in damages, of chattels unlawfully withheld by the wrong-doer, and, therefore, impliedly *converted to his own use*. The declaration, after describing the chattels, and claiming them as the property of the

plaintiff, alleges that he casually lost them out of his possession, and that defendant *found them*, (hence the word *trover*,) and *converted them to his own use*. The *finding* is mere *suggestion*, which need not be proved, and cannot be controverted; the *gist* of the action being that the chattel is the property of the plaintiff, and that it was *converted to his own use* by the defendant; which conversion is allowed to be sufficiently proved, after proof of the plaintiff's ownership, by showing that the defendant was in possession, and that upon demand made by the plaintiff, the defendant *refused or failed to deliver it*. (3 Bl. Com. 152; St. Pl. 19; Id. (Tyler,) 45, 50; 1 Chit. Pl. 167; 3 Rob. Pr. (2d. ed.) 441 & seq.)

3^b. Trespass on the Case in *Slander*.

The action of trespass on the case in *slander* is employed to *recover damages* by way of amends for defamation *by words spoken*. (3 Bl. Com. 123; 1 Chit. Pl. 123.)

4^b. Trespass on the Case in *Libel*.

The action of trespass on the case in *libel* is employed to recover damages by way of amends, for defamation *by words written, printed, &c.* (3 Bl. Com. 123; 1 Chit. Pl. 153.)

3^c. Mixed Actions.

The function of *mixed actions* is to recover land illegally withheld from the lawful owner, *together with damages* sufficient to compensate him for its wrongful detention. (3 Bl. Com. 183; St. Pl. 3; Id. (Tyler) 39.) Formerly in Virginia, when the *writ of right* was much employed to recover lands, it was provided by statute, that the demandant, if he recovered his seisin, might also *recover damages*, to be assessed by the same jury, for the tenant's withholding possession of the tenement demanded. (1 R. C. (1819,) p. 464; 1 Rob. Pr. (1st ed.) 478); thus converting the writ of right virtually into a *mixed action*.

The actions, however, which for many ages have been, and have been reckoned amongst mixed actions, are three, namely: (1), Ejectment; (2), Writ of dower, *unde nihil habet*; and (3), Writ of waste; the nature and purpose of each of which is now to be explained;

W. C.

1^f. The Action of Ejectment; W. C.

1^g. The Origin of Ejectment, and its Adaptations at Common Law.

The writ or action of ejectment was originally a mere *personal action* of trespass *vi et armis*, designed to *recover damages* from the defendant for breaking the close of the plaintiff, and ejecting him therefrom, and, there-

fore, distinguished from other actions of trespass *vi et armis*, by the designation "trespass *vi et armis, quare clausum fregit* ;"

W. C.

1^b. The adaptation of Ejectment to *recover terms for years*.

When the plaintiff, in an action of trespass *vi et armis, quare clausum fregit*, was only tenant for years, and complained that defendant broke his close and ejected him therefrom, demanding damages by way of amends for the injury, the opinion slowly prevailed, that in the same action *the land itself*, for the unexpired portion of the term, might also be recovered, as well as the damages. In the reign of Edward III, (ending A. D. 1377), and again in that of his successor, Richard II, (ending A. D. 1399), it is expressly laid down that an *ejectione firmæ*, (for ejecting one from his *farm* or *term*) was in its nature only an action of trespass, and that the plaintiff could no more recover his term unexpired, than he could in trespass recover damages for a trespass not committed. But in the reign of Edward IV, (ending A. D. 1483), it seems to have been held differently; for there it is said in argument, that in *ejectione firmæ* the plaintiff *shall recover* what remains *unexpired* of his term, as also damages for the time it was withheld from him. This was only a *dictum*, but significant of a growing sentiment on the subject; and in the reign of Henry VII, (ending A. D. 1509), it was solemnly so determined. (3 Reeves' Hist. Eng. Law, 390 '91.)

The first adjudication to this effect occurred in 14 Hen. VII, (A. D. 1499), the record of which is still to be seen in Rastall, where the judgment is *quod recuperet suum terminum predictum*; a judgment not warranted by the original writ, which goes only for damages for the trespass, without any hint at restitution. And soon after this important resolution, the writ of ejectment was applied freely to recover the possession wherever the claimant had only a *term for years* therein; and ere long, by another adaptation, it was applied to recover a *freehold*, and speedily came to be very generally employed as a means of *trying the title to lands*, in place of the multifarious, complicated and protracted proceedings in real actions. (4 Reeves' Hist. Eng. Law, 165-'6.)

Doubtless the inducing motive for this remarkable perversion of the personal action of trespass to recover the term itself was the annoyance and disturbance of the course of justice, arising from the complication, and the enormous delays incident to real actions; but it

may be conjectured, that the courts were rendered less averse to such a step in consequence of the little value which, at common law, was attached to a term for years; a depreciation due in part to the fact that originally such terms were granted for the most part to a very inferior class of people; and in part also to their being liable, until Stat. 21 Hen. VIII, c. 15, (A. D. 1536), to be defeated at any time by a *common recovery* suffered by a tenant of the freehold, which annihilated all leases for years then subsisting, the recoveror's title being supposed to be superior to his by whom those leases were granted. (2 Bl. Com. 142.) By reason of this precarious character of the estate of the lessee for years, the court, in giving judgment for the unexpired portion of the term, might very well have acted upon the maxim *de minimis lex non curat*.

Let us consider next the adaptation of the action of ejectment to recover *freehold estates*.

2^h. Adaptation of Ejectment to recover *Estates of Freehold*.

The first use made of the action of ejectment to recover freehold estates was *without any fictions* whatever, simply by bringing about a state of facts to which the action was applicable. At a subsequent stage *fictions* were substituted for these *contrived facts*. Let us consider then, the adaptation of ejectment to the recovery of freehold estates: (1), Without *fictions*; and (2), *With fictions*;

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1¹. Adaptation of Ejectment to recover *Freehold Estates Without Fictions*.

The demandants of the freehold, in order to avoid the delays and embarrassments with which *real actions* were encumbered, very soon began to avail themselves of the less complicated and more speedy remedy afforded by the new development above mentioned, of the action of *ejectione firmæ*, or trespass *vi et armis, quare clausum fregit*. The plan adopted was for the claimant of the freehold to enter upon the lands in dispute, and there to make a lease of the same for a term of years, and put the lessee into possession of the premises, where he remained until he was evicted by the wrongful occupant thereof, which was generally accomplished ere many hours were elapsed. Being evicted, the lessee instituted the action of ejectment (*ejectione firmæ*) against the occupant, thus necessarily bringing into immediate comparison the title of the claimant (his lessor) and that of the occupant; and if it proved to

be superior, the lessee recovered his *term* of the occupant, as well as damages; and being put thus into possession of the land, his recovery, of course, redounded to the benefit of the lessor.

The student will observe that nothing is here feigned. The claimant made a real entry into the lands in dispute, and on the lands executed an actual lease to a real lessee, who was on the spot to take actual possession, and was afterwards actually evicted. All the elements of the case—the entry, the lease, and the eviction—were *real*, and of actual occurrence. In process of time, however, it came to be perceived that the lessee was not obliged to wait to suffer an *actual* eviction; but that by *construction of law*, of the two tenants, he was the trespasser who had no just title to the possession; and that merely by *being there*, without any other act, he committed, in law, an ejectment of the other; but that construction of law was *not a fiction*. It was a legal inference from the existing facts.

This seems to have been the obvious and the first way in which a title to land was tried by ejectment. It was regular and simple, and consistent with the process and proceedings in other actions; but the legal notion of trespass and ejectment was of such latitude as to leave an opening for fraud and artifice to introduce some singular novelties into the proceedings in this action. If the adverse occupant of the premises might be considered as a trespasser, by continuing in possession after the lease made by the claimant to his lessee, so might every one of his servants, and every stranger who *casually* came on the land; and these, equally with him, might be made defendants, and put to show by what authority they were there. The claimant and his lessee would of course sometimes, and perhaps very often, take advantage of these principles to practise a *surprise* (not to say a *fraud*) upon the adverse occupant, by procuring a friend to come upon the premises just after the lease was made by the claimant to his lessee; and the friend thereby becoming in law a *trespasser*, and his entry being an ejectment, the lessee would forthwith institute the action of ejectment against him, and being allowed to obtain judgment by default, an execution of *habere facias possessionem* would issue, to put the claimant's lessee into possession of the land, whereby the adverse occupant would necessarily be turned out, although he had had no opportunity whatever of bringing his title into com-

parison with that of the claimant, and so was put to the necessity of bringing an ejectment in his turn, in order to recover back the land.

A practice like this, so tricky and unjust, could not long escape animadversion, and the courts soon made it a rule that no execution should issue, where the ejector was a stranger, until the adverse occupant had received notice of the pendency of the action, and been allowed, if he chose, to defend it *in the room* of the stranger-ejector. This rule did away with the collusive and fraudulent advantage derived from these clandestine ejectments; but the practice of proceeding at first against some stranger, called since a *casual ejector*, was still kept on foot; for the judgment obtained in this manner against the latter was still good in law, notwithstanding the tenant was admitted to try his right. It put the latter under the necessity of defending the action, lest he should be turned out; and should the question of title be determined by a jury in favor of the plaintiff, execution would issue more speedily than if the action had been brought primarily against the adverse occupant.

Thus did ejectment receive a new form, owing to circumstances necessarily attending it, and to certain consequences following from the legal properties of a *trespass*. It will be observed, however, that the lessee and casual ejector are *real persons*, and the entry, lease, and ejectment *actual occurrences*. Such the practice continued to be till the end of queen Elizabeth's reign, and some years after, when the practitioners got into the habit of facilitating the process very materially by means of certain fictions; feigning, that is to say, the entry of the claimant, the lease made by him on the premises of the same, and the ejectment or *ouster* therefrom; fictions which the courts allowed and encouraged, finding that they tended to expedite an action which had proved remarkably useful; so that, altogether, the ejectment became a very curious and complicated proceeding.

See 4 Reeves' Hist. Eng. Law, 166 & seq.

2^d. Adaptation of Ejectment to recover *Freehold Estates with Fictions*.

To save the trouble of the claimant's entry upon the premises,—his lease made thereon, demising the same for a term of years, to the lessee,—and the lessee's eviction or *ouster* therefrom, these transactions were all feigned; and in order to prevent the adverse claimant from contesting, and to constrain him to ad-

mit them; the action was instituted, *not against him*, but against a *purely fictitious person*, (commonly called *Richard Roe*.) The *lessee* also, in whose name as plaintiff, it was instituted, (*usually* under the designation of *John Doe*,) was in like manner fictitious; the *style* of the suit, when first brought, being, "John Doe, *e. d.* (*ex demissione*, on the demise or lease of) David Demandant v. Richard Roe."

This fictitious defendant, (who is styled the *casual ejector*) is represented to have ejected or ousted the plaintiff, John Doe, from the premises for which he demands damages. And Richard Roe, the defendant, is now made to address a note (appended to the declaration), to the adverse claimant, (whom we may call *Obed Occupant*,) telling him that he, (Richard Roe,) has been sued as set forth in the declaration; that he has no interest in the matter, and does not design to defend the suit; and advising him, (*Obed Occupant*,) to get himself made defendant thereto, or that else he will be turned out of possession.

This note, together with the declaration to which it is appended, being served on *Obed Occupant*, (by delivering him a copy, &c.,) he presents himself to the court, and *asks the favor* to be substituted as defendant in the room of Richard Roe. Being thus a *supplicant for favors*, the court may *impose terms*, and his request is granted only on condition that he shall confess upon the record, the *three fictitious circumstances* above referred to, namely, the entry on the land made by David Demandant, his lease of the premises to John Doe for a term of years, and John Doe's ejection, or *ouster*, by Richard Roe; and that he shall consent to go to trial *upon the title only*. This *rule*, or *order of court*, admitting *Obed Occupant* as defendant in place of Richard Roe, is styled "*the consent rule*" or *order*; and after it is made, Richard Roe's name is dropt from the proceedings, and the style of the suit thenceforward is, "John Doe, *e. d.* David Demandant v. *Obed Occupant*."

The form of the entry will illustrate the proceeding. It is as follows.

John Doe, <i>e. d.</i> , David Demandant, . . . Plaintiff,	
vs. }	In Ejectment,
Richard Roe,	Defendant.

On the motion of *Obed Occupant*, who confesses the lease, entry, and ouster in the declaration supposed, and agrees to insist on the title only at the trial, he

is admitted a defendant in this suit, in the room of the said Richard Roe; and thereupon, by his attorney, comes and defends the force and injury, when, &c., and says that he is not guilty of the said supposed trespass and ejectment above laid to his charge, or of any part thereof, in manner and form as the said John Doe hath above thereof complained against him; and of this he, the said Obed, puts himself upon the country, &c. (Rob. Forms, 125; 3 Chit. Pl. 1141.)

Of course the fictitious names, *John Doe* and *Richard Roe*, may be replaced by any others, according to "the taste and fancy" of the user; and those whose genius disdains the trammels of custom sometimes substitute for John Doe "Aminidab Seekright," or "Gregory Goodtitle," whilst others, with less lofty originality content, decline upon such unambitious names as "Andrew Jackson," &c.

Whilst the action of ejectment was at first designed to recover merely *damages* for the ejection, and by adaptation only was gradually fitted to recover the land also, as well as damages, constituting it properly a *mixed action*; yet no sooner had it become established as a means, and the favorite means, of recovering lands than the old ideas recurred. It was considered rather in the light of a *real action*, the plaintiff rarely prepared himself to prove the actual damages arising from the detention, not caring probably to distract the jury's attention, or his own, from the main question of *title*, to the secondary one of *rents and profits*; and, therefore, upon the ejectment he took *nominal damages*, and afterwards brought a *new action* of trespass for the mesne profits, of which action there is no mention till some time after the reign of Queen Elizabeth. (4 Reeves' Hist. Eng. Law, 168.) And Blackstone mentions this as the received practice in his day, (3 Bl. Com. 205,) as it continued to be long afterwards. (3 Bl. Com. 205, n (12).)

See 3 Bl. Com. 199 & seq; St. Pl. 11, 32; Id. (Tyler,) 52, 70.

2^d. Ejectment in Virginia, by Statute

Ejectment in Virginia is by statute substituted in all cases for the *writ of right*, (which is abolished,) retaining besides, its original application, and the *fictions are abolished*. The plaintiff, in his own name, states in direct terms his real title, setting it out distinctly whether it be in fee-simple, for life, or for years, instituting his action (which still purports to be an action of trespass *vi et armis*,) directly against the person in adverse pos-

session, or having an adverse claim. (V. C. 1873, c. 131, § 1 & seq.)

He may also recover damages in the same action for *mesne profits*, for any period not exceeding *five years* before the commencement of the suit *until verdict*, and also for *any waste* for which the defendant is chargeable, provided he file with his declaration a statement of the profits, and other damages he means to demand. (V. C. 1873, c. 131, § 30, 31.)

2^d. The Writ of Dower *unde nihil habet*.

The writ of dower *unde nihil habet* is employed in order to recover a widow's dower unlawfully withheld, or to speak *technically*, of which *she is deforced*, where she has received no part of her dower in the tract of land in question, (whereof she has nothing,—*unde nihil habet*), together with damages for its detention, wherever her husband *dies seised*. If her husband does not die seised, she recovers damages, not from the *period of his death*, as in that case, but from the *time of the suit brought*. (3 Bl. Com. 183; St. Pl. 10; Id. (Tyler), 45; 1 Th. Co. Lit. 585 & seq. & n (R) & (S); V. C. 1873, c. 106, § 11.)

The damages are recoverable by the widow only in pursuance of the statute of Merton, (20 Hen. III, c. 1), and by our corresponding statute. (V. C. 1873, c. 106, § 10, 11; 2 Insts. Com. & Stat. Law, 150, 152-3.)

The most usual and approved remedy for dower, however, is a *bill in equity*; although, by statute with us, the action of ejectment is allowed to be used for the purpose, and would be in most cases an easy and efficient remedy. (V. C. 1873, c. 106, § 10, 11, 12; Id. c. 131, § 9, 29; 2 Insts. Com. & Stat. Law, 151.)

3^d. The Writ of Waste.

The writ of waste is employed to recover the "*thing* (place) *wasted*" by a tenant for life or years, together with *treble damages*. It existed at common law, but only as the medium for recovering the amount of *damages* which would compensate the injury, that being at common law the only forfeiture exacted for waste; and that being recoverable of no other tenants save those who came in by the *act of the law*, (*e. g.* tenant by the curtesy, tenant in dower, and guardian in chivalry); those tenants who came in *by act of the parties* being restrained no otherwise than *by the covenants* inserted in the lease. The statute of Marlebridge, (52 Hen. III, c. 23, A. D. 1268), allowed the writ of waste against *all tenants for life or years*; but the recovery was still no more than the value of the damages done until, by the statute of Gloucester, (6 Edw. I, c. 5, A. D. 1278), it was enacted that the land-

lord or reversioner should recover "the *thing* wasted, and treble damages." The writ of waste, which before had been a mere *personal action*, thenceforward became *mixed*, having for its object the recovery, not only of the *treble damages* given by 6 Edw. I, but also of the *place wasted*.

See 2 Insts. Com. & Stat. Law, 591 & seq, 613 & seq, 628 & seq.

Our statutes still retain the provisions of the statute of Marlebridge, (52 Hen. III, c. 23), save only that, instead of being confined to tenants *for life and for years*, they are extended *to all tenants*, (V. C. 1873, c. 133, § 1), and until 1850 we had retained also the full effect of the statute of Gloucester, (6 Edw. I, c. 5); but by the revisal of 1849, the severe penalty of forfeiture of the *place wasted* was discarded, and treble damages exacted only where the waste is *wanton*,—whatever that may mean. (V. C. 1873, c. 133, § 1, 4.)

With us, therefore, there can be no recovery of the place wasted, so that, although the writ of waste may probably still subsist, it is *not a mixed action*, but is remanded to the function which belonged to it prior to 6 Edw. I, c. 5, namely, the *recovery of damages*. Nor indeed, is it in practice likely to be resorted to for that purpose, seeing that by the express terms of the statute (V. C. 1873, c. 133, § 4), the easier and more universal remedy of an *action on the case* is allowed.

See 2 Insts. Com. & Stat. Law, 628, 631.

3^d. The *Joinder of Several Causes of Action* in one Suit.

Where the plaintiff has several causes of action against the defendant, which he is at liberty to join in one action, he ought to *bring one action only*; and if he harass the defendant with two or more actions, where one would include all his causes of complaint, he may be compelled to *consolidate them*, and to pay the extra costs arising from the needless multiplicity of suits, as well as the costs of the defendant's application for redress. It is therefore, material to ascertain when several demands may be included in the same action. The general doctrine is that demands may be joined when they are *of the same nature*, and the *same judgment is to be given* in all, notwithstanding the *pleas may be different*. Thus, several demands, all in the *nature of debt*, may be joined; and so also, several demands depending on *covenants under seal*, or several dependent on agreements *not under seal*. So in actions *ex delicto*, several distinct trespasses may be joined in the same *action of trespass*; and several causes of action *in case* may be joined. (1 Chit. Pl. 228 & seq; 3 Bl. Com. 295, and n (6); St. Pl. 267; Id. (Tyler) 254, & seq.) But it must be observed that causes

of action *in tort* cannot be joined with causes arising out of *contract*. Thus, trespass on the case *in assumpsit* cannot be joined with trespass on the case *in trover and conversion*; nor debt with trespass *vi et armis*, (1 Chit. Plead. 231; 4 Rob. Pr. 874; Creel v. Brown, 1 Rob. 265). Nor is it admissible to join several *species* of action in one declaration, although they may be all *ex contractu*, or all *ex delicto*. Thus, assumpsit, covenant, debt or account, cannot be joined with each other; nor at common law trespass with case; for they are actions of distinct natures, and the judgments are different, that in trespass being in strictness, *quod capiatur*, and that in case *quod sit in misericordia*; but in Virginia it has been held, that since our statute allowing *case* to be brought wherever *trespass can be maintained*, (V. C. 1873, c. 145, § 6), counts in trespass may be joined with counts in case in an action *on the case*, for which trespass would lie. (1 Chit. Pl. 231; Parsons v. Harpers, 16 Grat. 71-'2.)

And because demands cannot be joined, although they be of the same nature, if the *judgments are not the same*, it follows that, in a personal action, a demand in favor of or against one personally cannot be joined with one in favor of or against the same, or another party, as *executor or administrator* of a person deceased; for the judgment against a party in his personal capacity is *de bonis propriis*, whilst against him as executor or administrator it is *de bonis testatoris*; and so a judgment *in favor* of a plaintiff as executor or administrator, is that he "*as executor or administrator of, &c., recover,*" whilst a personal judgment in his favor is without any qualification whatever. (1 Chit. Pl. 234, 235, & seq; 4 Rob. Pr. 878, & seq.)

When mention is made of certain distinct causes of action being joined in one declaration, the student should bear in mind that this is done by means of *several counts*, the nature of which is very sufficiently explained in 3 Bl. Com. 295, in conjunction with St. Pl. 266 & seq; Id. (Tyler) 254 & seq; and in this work will be amply elucidated in a subsequent passage. *Count* is the old name for declaration (Fr. *conte*; Lat. *narratio*), and in modern times is confined in *personal actions* to cases where the declaration contains several distinct complaints set out in as many separate clauses, which are denominated *counts*.

There is an anomaly connected with the *joinder of actions* to which the student's attention should be directed, namely: that *debt and detinue* may be joined in the same action, although the one is *in contract*, whilst the other is *in tort*, and although the *forms of the judgment vary*. And for this no better reason is given than that both actions suppose a *detention*, the one of money, the other of some collateral chat-

tel. (1 Chit. Pl. 229; 4 Rob. Pr. 874; *Coryton v. Lithbye*, 2 Sand. 117, b. note.) Chitty does indeed suggest that it probably came about from the practice of such joinder of debt and detainue being sanctioned by the entries in the *registrarium brevium* (1 Chit. Pl. 230); but that only puts the embarrassment one step further back in point of time, without resolving it. In *Dalston v. Janson*, 5 Mod. R. 89, the court treat it as anomalous and strange that they should be joined; and the most authoritative writer on the practice of the English courts at common law considers that the joinder is confined to those cases where the demands are severally *founded in contract* (1 Tidd's Pr. 11, n. (b)); but the difficulty is not obviated by that suggestion, even supposing it to be sustained by *judicial authority*, as it is believed not to be. Nothing remains, therefore, but to remember it as an unexplained, or imperfectly explained, anomaly.

The consequences of a mis-joinder of counts, or causes of action, are more material than in case of a single count being defective; for in the case of a mis-joinder, however perfect the counts may respectively be in themselves, the declaration will be bad on *general demurrer*, but not (under our statute of *jeofails*, (V. C. 1873, c. 177, § 3), on motion in arrest of judgment, or on writ of error, unless a *demurrer had been put in and overruled*. (1 Chit. Pl. 236.)

4^d. Election among Several Concurrent Actions.

We have seen that debt is sometimes concurrent with covenant, and sometimes with *assumpsit*; and that the action of *trover and conversion* is concurrent with detainue. The inquiry now is, what considerations would determine the choice of the practitioner between debt, and covenant, and *assumpsit*, and between *trover and conversion*, and detainue. (1 Chit. Pl. 237 & seq);

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1^o. Considerations which determine the Choice *between Debt and Covenant*, or *Debt and Assumpsit*.

In favor of choosing *the action of debt* the practitioner will consider:

(1), That in debt, the declaration is short, direct, and of import easily remembered; whilst in covenant and *assumpsit* it is longer, more complex, and less easily retained in memory;

(2), That in debt there is no occasion for a *writ of inquiry* of damages; that is, where the demand is founded upon *any writing* for the payment of money, signed by the party to be charged; whereas, in *assumpsit*, or in covenant, there can be no judgment until a *writ of inquiry is executed*, which may occasion delay.

On the other hand, *in favor of covenant or assumpsit*, is

the consideration that either of those actions is applicable also to recover damages for a violation of a contract *to do a collateral thing*, so that, if there be a promise to do such collateral thing, as well as to pay money, covenant or assumpsit would include both causes of action, whereas in debt, one could recover only upon the promise to *pay money*.

Another pregnant consideration adverse to the use of the action of debt, where the promise to pay money is *not under seal*, prevails at common law, namely, that upon such a promise the defendant in the action of debt, may invoke the trial of his cause by *wager of law*, which is a very curious exemplification and relic of our ancestor's habitual distrust of the average veracity of mankind, and of their own inability, by means of cross-examination, to eviscerate the truth,—a distrust which led them in very many instances, (of which this is one,) to substitute *general presumptions* founded on *probabilities*, for special testimony and investigation in each case. In trial by *wager of law* the defendant presented himself in court, attended by eleven of his neighbors, and he having in open court taken an oath that he *did not owe the debt*, his eleven *compurgators* swore that they *believed him*, which, as being the verdict (*verdictum*) of twelve men, was considered sufficient to discharge the defendant from the action.

The trial by *wager of law* is applicable only to actions of debt on *simple contract*, of *detinue*, and of *account*, and lies not when a party, by conviction of perjury, or otherwise, has become *infamous*, nor in favor of executors or administrators, sued as such; for in the former case the party's oath is discredited by his conduct, and in the latter, he cannot have the information to enable him to swear. (3 Bl. Com. 341 & seq.)

The liability to *wager of law* led to the general disuse of the action of debt on *simple contract*, and to the action of *detinue*; assumpsit being habitually substituted for debt, and *trover* and conversion for *detinue*. (3 Bl. Com. 347-'8.)

Trial by *wager of law* was not abolished in England until Stat. 3 & 4; Wm. IV, c. 42, (A. D. 1834); and has not been to this day *in terms* abolished with us but has never been in use, and is supposed to have been by implication done away with by that provision which, ever since 1776, has maintained its place in our organic law, that "in controversies respecting property, and in suits between man and man, the *trial by jury* is *preferable to any other*, and ought to be held sacred." (St. Pl. 77, n. (8); Va. Const. 1869, Act. I, § 13.)

2°. Considerations which determine the Choice between *Detinue* and *Trover and Conversion*.

If the chattel withheld is of exceptional *specific value*, as by having attached to it a *pretium affectionis*, so that the claimant is specially desirous to recover it in kind, or if it is of a character likely to *appreciate in value*, these are considerations which point to the use of the action of detinue, rather than of *trover and conversion*; whilst, if the chattel has no specific and peculiar value, nor is likely to appreciate in value, and especially if it is likely to *depreciate*, and most especially if it is *perishable*, these considerations decidedly recommend *trover and conversion* rather than detinue. In detinue plaintiff recovers the specific chattel, if to be had, or if not, its alternative value *at the time of the verdict*; whilst in trover and conversion the value at the *time of the conversion*, which is before suit brought, is recovered. Hence the expediency of one or the other action, according as the property is appreciating or depreciating in value. Thus, if the chattel consisted of a young blooded mare, worth say \$500, it might be best to bring detinue, for in that action the plaintiff would not only recover her when she was, or might probably be, of much increased value, but he might recover also any colts that she might meanwhile produce. (*Morris v. Peregoy*, 7 Grat. 373.) On the other hand, where the property is *perishable*, as the action of detinue claims it as still belonging to the plaintiff, if it perishes before verdict and judgment, it perishes the plaintiff's property, and it would seem that upon *principle* the suit should abate, supposing the fact of the destruction to be put in issue by a plea *puis darrein continuance*. (*Austin's Ex'or v. Jones*, Gilm. 341; 3 Rob. Prac. (2nd ed.) 468; *Caldwell v. Fenwick*, (Ky.) 333.)

The considerations connected with the trial of *wager of law* at common law as influential, at present, would be out of place, as well here as in England, in consequence of the abolition of that mode of trial.

5^d. The Proper *Parties to Actions*; W. C.

1^o. Proper Parties to Actions *ex contractu*.

In actions *ex contractu* the general principle is that the action must be brought by the person who *has the legal title* to the benefit of a contract, inasmuch as a *court of law* does not usually take cognizance of an *equitable title*. But this principle, which was once universal, has in process of time, in *personal actions*, come to be subject to many exceptions. Thus, in contracts *not under seal*, it has been held for two centuries or more, that any one *for whose benefit* the contract was made may sue upon it; that is, if A promises Z, not under seal, but for valuable consideration, to pay B \$1000, B may in his own name maintain an action on the promise against A. (1 Chit. Pl. 4, 5.) But

where the promise is *under the seal of the promisor*, the common law never relaxed its requirement that the action should be brought by the promisee alone, or his personal representatives, and not by any one *for whose benefit*, ever so expressly, the promise was made; a rule which is particularly inflexible where the deed is an *indenture* or *inter partes*. Thus, if in a deed indented, "between A of the first part and Z of the second part," there be contained a stipulation that Z should pay C \$1000, C can maintain no action for the money; and even if it be a *deed-poll*, whereby Z stipulates *with A* that he will pay C \$1000, the better opinion is, that at common law no action is maintainable by C. (1 Chit. Pl. 3, 4; *Ross v. Milne & ux*, 12 Leigh, 204, 218 & seq.) Here, however, our statute law has intervened, and permits the *beneficiary* to assert his merely equitable title in his own name, in a court of law, in both of the cases last stated. "If a covenant or promise," says the statute, "be made for the *sole benefit* of a person with whom it is not made, or with whom it is made jointly with others, such person may maintain in his own name any action thereon which he might maintain in case it had been made *with him only*, and the consideration had moved from him to the party making such covenant or promise." (V. C. 1873, c. 112, § 2; see 3 Rob. Pr. (2nd ed.) 14 & seq. *Jones v. Thomas*, 21 Grat. 101-'2.)

Another exception to the general doctrine above stated, which also owes its origin to a statute with us, is that the "*assignee of any bond, note or writing not negotiable*, may maintain thereupon any action *in his own name* which the original obligee or payee might have brought," (V. C. 1873, c. 141, § 17), thus allowing the assignee of *such writings* to assert his title to the debt, which is purely equitable, in a court of law.

Perhaps assignees *in bankruptcy* may be reckoned yet another exception. They are allowed to prosecute suits to recover the bankrupt's effects in their own names; but as they claim in pursuance of the bankrupt law, it may perhaps be considered that their title is not *equitable*, like that of assignees generally of common law *choses in action*, but *legal*. (1 Abb. U. S. Pract. 103, § 16; 1 Chit. Pl. 25 & seq; Rev. Stats. U. S. 981, § 5047.)

The party or parties to be made *defendants* to an action *ex contractu*, must be determined by the tenor of the contract itself. Whoever *promises* may in general be sued, but upon this subject the distinctions connected with agents, partners, joint-contractors, &c., are too nice and numerous to be stated in a short compass, and it must, therefore, suffice to refer to 1 Chit. Pl. 37 & seq; 3 Rob. Pr. (2d ed.) 41 & seq.

2°. Proper Parties to Actions *ex Delicto*.

In actions *ex delicto* the same general principle prevails as in actions *ex contractu*, namely, that the action must in general be brought in the name of the person whose *legal right* has been affected, and who was legally interested in the property to which the tort relates at the time the tort was committed. (1 Chit. Pl. 69 & seq.) Thus, a *cestui que trust*, or other person having only an *equitable interest*, cannot, for the most part, sue in the courts of common law, either his trustee or a third person, unless in cases where the action is against a mere wrong-doer, and for an injury to the *actual possession* of the *cestui que trust*. (1 Chit. Pl. 69.) Indeed, wherever one is *in possession*, notwithstanding he may have only an *equitable title*, when that *possession* is invaded, a *legal wrong* may fairly be considered as having been committed against him, so as to qualify him to sue therefor in a court of law.

The proper *defendants* in actions *ex delicto* are those in general who committed the tort, whether by their own hands, or by the hands of others. Even an *infant* may be made responsible for torts, as corporations may also be.

See 1 Chit. Pl. 87 & seq.

When the defendant has occasion to invoke his own title to the subject, as a defence to the alleged tort, the title must in general be as much a *legal title*, as if he was founding an action upon it, and for the same reason; that is to say, that as a general rule, a *court of law* will not take cognizance of a title *merely equitable*. Thus, if the defendant, in an action of ejectment, relies upon his own better title, it must usually be a *legal title*, and if not, his defence, if it is available anywhere, must be made in a *court of equity*. To this general doctrine our statutes have introduced two very marked exceptions,—enacting, (V. C. 1873, c. 131, § 20, 21, 22), substantially,

(1), That where a *vendor* brings ejectment for the land against his *vendee*, whom he has put in possession thereof without conveying to him the legal title, and the contract of sale being *in writing and signed by the vendor*, has been fully performed by the vendee, or so far performed as would in equity entitle him to a conveyance of the legal title without condition, the vendee may, by proving these circumstances, (which constitute properly only an *equitable defence*), repel the plaintiff's action:

(2), That where a like action is brought *against a mortgagor, or grantor in a deed of trust*, who is in possession, but without the legal title, by the mortgagee or trustee who has such title, the defendant may resist the plaintiff's action by showing the payment of the whole sum, or the perform-

ance of the whole duty, or the accomplishment of the whole purpose which the mortgage or deed of trust was made to secure or effect, so that a court of equity would revest the legal title in him without condition.

But in order to have the benefit of these defences, *notice in writing* must be given of them *sixty days before the trial*. And whether he shall or shall not make or attempt such defence, the defendant shall not be precluded from resorting to equity for any relief to which he would have been entitled if these provisions had not been enacted.

SECTION iii.

3^b. General Classification of Wrongs, *with a view to the Remedies* therefor, (and chiefly in the courts of *Common Law* as opposed to *Equity*.)

Under this very comprehensive head we are to consider, (1), The wrongs which affect *individuals*, and the remedies therefor; and (2), The wrongs which affect *the commonwealth*, and the remedies therefor;

W. C.

1^c. The Wrongs which affect *Individuals*, and the Remedies to redress the same.

We may here consider, (1), The wrongs which affect the rights *relating to the person*, and the remedies therefor; (2), The wrongs which affect the rights *relating to property*, and the remedies therefor;

W. C.

1^d. The Wrongs which affect the Rights *Relating to the Person*, and the Remedies therefor.

We have seen that the rights which relate to the person, are either *absolute rights* or *relative rights*, and of course the exposition of wrongs must follow the same division. Let me therefore enquire into (1), The wrongs to *absolute rights*, and the remedies therefor; and (2), The wrongs to *relative rights*, and the remedies therefor;

W. C.

1^e. The wrongs to *Absolute Rights*, and Remedies therefor.

It will be remembered that the absolute rights are with us four in number, namely: the right of personal security, personal liberty, private property, and freedom of conscience; and the wrongs must of course relate to each of those subjects severally. The inquiry must therefore be directed to (1), The wrongs which affect the right of *personal security*, and the remedies therefor; (2), The wrongs which affect the right of *personal liberty*, and the remedies therefor; (3), The wrongs which affect *private property*, and the remedies therefor; and (4), The wrongs which affect *freedom of conscience*, and the remedies therefor;

W. C.

1^f. The Wrongs which affect the Right of *Personal Security*, and the Remedies therefor.

The wrongs which affect one's *personal security* correspond of course to the *rights* included under the head of personal security, which the student will remember embraces the *five particulars* following, namely: Security of *life*; Security of *limbs useful in fight*, for defence or annoyance; Security of *body*; Security of *health*; and Security of *reputation*. (1 Insts. Com. & Stat. Law, 52 & seq; *Ante*, p. , &c.) We are, therefore, to consider, (1), The wrongs which affect one's *security of life*; (2), The wrongs which affect one's *security of limbs useful in fight*; (3), The wrongs which affect one's *security of body*; (4), The wrongs which affect one's *security of health*; and (5), The wrongs which affect one's *security of reputation*; together with the remedies appropriate to each several class;

W. C.

1^g. The Wrongs which affect one's *Security of Life*, and the Remedies therefor:

The common law has always regarded with horror injuries aimed at human life, to take away which it esteems one of the most atrocious crimes. It seeks to prevent it by affixing to it the heaviest penalty it is in its power to inflict; and also, when the attempt can be anticipated, by requiring *surety of the peace*; but it provides *no civil redress therefor*. (V. C. 1873, c. 187, § 1 to 12, 21 to 26; Id. c. 197, § 1 to 9.)

The revisors of the Code of 1849 proposed to allow an action to recover damages for injuries resulting in death, wherever the party killed might have maintained an action had not death ensued, (Revisors' Report, III, p. 734, c. 148); but although the suggestion had the sanction of English experience, (9 & 10 Vict. c. 93, § 1,) it was not adopted by the General Assembly until a fatal disaster on the Chesapeake and Ohio railroad, at a place called *Jerry's Run*, in the summer of 1870, irresistibly enforced the need of such a provision, and led to the act of 14th of January, 1871, for which see V. C. 1873, c. 145, § 7 to 10.

"§ 7. Whenever," says the statute, "the death of a person shall be caused by the wrongful act, neglect, or default of *any person or corporation*, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured, or if she be a married woman, her husband, either separately or together with her, to maintain an action and recover damages in respect thereof, then, and in every such case, the person

who, or corporation which would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to a *felony*, provided that in no case shall the recovery exceed the sum of \$10,000. .

"§ 8. Every such action shall be brought by and in the name of the personal representative of such deceased person, and within *twelve calendar months* after his or her death. The jury in any such action may award such damages as to it may seem fair and just, and may direct in what proportion they shall be distributed to the *wife, husband, parent, and child* of the deceased.

"§ 9. The amount recovered in any such action shall, after the payment of costs and reasonable attorney's fees, be paid to the *wife, husband, parent, and child* of the deceased, in such proportion as the jury may have directed, or, if they have not directed, according to the *statute of distributions*, and shall be free from all debts and liabilities of the deceased; but if there be no wife, husband, parent, or child, the amount so received *shall be assets* in the hands of the personal representatives, to be disposed of according to law.

"§ 10. Rights of action under this act shall not determine, nor shall such actions, when brought, abate by the *death of the defendant*."

The remedy under this statute is, as in other cases at common law where the injury results *directly* from the force applied by the wrong-doer, trespass *vi et armis*; otherwise, by trespass on the case; the object of either action being to recover damages in some degree proportioned to the injury. But it will be remembered, that in Virginia, by statute, "in any case in which an action of trespass will lie, there may be maintained an action of trespass on the case." (V. C. 1873, c. 145, § 6.)

2^s & 3^s. Wrongs which affect the *Security of the Limbs and Body*, and Remedies therefor.

The wrongs which affect the security of the limbs and of the body are of the same general nature, and indeed identical, save only in respect to the injury of *mayhem*, which is confined exclusively to the *limbs*, and to the limbs *useful in fight*, whether for retreat or assault. These wrongs may, therefore, be classed together under the heads following: (1), Menaces, or threats of bodily hurt; (2), Assault; (3), Battery; (4), Wounding; and (5), *Mayhem*. The *remedies* for them may also be considered together, they being essentially the same;

W. C.

1^h. Wrongs by *Threats and Menaces* of bodily Hurt.

In order that threats and menaces may amount to such an injury as may be the subject of an action, they must be of such a character that through the fear reasonably engendered by them a *man's business is interrupted*. A menace alone, without a consequent inconvenience, makes not the injury; but to complete the wrong, there must be both of them together. (3 Bl. Com. 120; Com. Dig. Battery, (D).)

2^h. Wrongs by *Assault*.

An assault is an attempt or offer to beat another without touching him; as if one lifts up his cane or his fist in a threatening manner at another, or strike at him but misses him. This is an assault (*insultus*), which amounts considerably higher than bare threats, though still only an inchoate violence, and, therefore, though no actual suffering be proved, yet as the party's right to absolute personal security is thereby invaded, an action lies to recover damages as a compensation for the injury. It should be observed, however, that the attempt or offer to commit the bodily harm must be by means calculated to *produce the end*, if, carried into execution. Levelling a gun at another within a distance from which, supposing it to have been loaded, the contents might wound, is an assault. But *abusive words* merely are never such. (3 Bl. Com. 120, & n (3); Bac. Abr. Assault, (A); Com. Dig. Battery, (C).)

3^h. Wrongs by Battery.

A battery is the *unlawful beating* of another. The least unlawful touching of another's person, *wilfully or in anger*, is a battery; for the law cannot draw the line between different degrees of violence, and, therefore, totally prohibits the first and lowest stage of it, every man's person being sacred, and no other having a right to meddle with it in any the slightest manner. A battery, however, is in some cases justifiable or lawful, as where a parent or master gives moderate correction to his child, his scholar, or his apprentice. So also, on the principle of self-defence, for if one strikes me first, or without striking, only assaults me, I may strike in *my own defence*, supposing the circumstances to demonstrate that the assailant *designs further violence*; and if sued for it, may plead *son assault demesne*, or that it was the plaintiff's own original assault that occasioned it. So likewise, in defence of my goods and possession of my land, if a man endeavors to deprive me of them, I may justify laying hands on him to prevent

him; and in case he persists with violence, I may proceed to beat him away. Thus, too, in the exercise of an office, as that of a constable, a man may lay hands on another, in order to execute a warrant or writ, &c.; and if sued for this, or the like battery, he may set forth the whole case, and plead that he laid hands upon him gently, *molliter manus imposuit*, for this lawful purpose. On account of these and other like causes of justification, battery is defined as above, the *unlawful beating* of another; for which the remedy is, as we shall see, (just as for assault), by action of trespass *vi et armis*, or with us, trespass on the case, wherein the jury will give adequate damages. (1 Bl. Com. 120-'21; Bac. Abr. Assault & Battery, (B); Com. Dig. Battery, (E. 1); Id. (A).)

4^h. Wrongs by Wounding.

A wound is defined by Blackstone *to be any dangerous hurt*, and he justly characterizes it as only an *aggravated species of battery*. (3 Bl. Com. 121). But according to the later authorities, the *medical* definition, which is more accurate, is to be preferred, namely: that a wound is "a recent solution of continuity in the soft parts." (2 Beck's Med. Jurisprud. 178; Rex v. Wood & al, 4 Carr. and P. (19 E. C. L.) 381; Rex v. Withers, Id 446; Rex v. Payne, Id. 558; 3 Whart. Crim. Law, § 3479.)

5^h. Wrongs by Mayhem.

Mayhem is an injury deemed by the law more atrocious than any of the foregoing, and consists in violently *depriving another of the use of a member proper for his defence in fight*. This is a battery attended with this aggravating circumstance, that thereby the party injured is forever disabled from making so good a defence against future external injuries as he otherwise might have done. Among these defensive members are reckoned not only arms and legs, but a finger, an eye, and a *fore-tooth*, and also some others. But the loss of one of the *jaw-teeth*, the ear, or the nose, is *no mayhem at common law*; as they can be of no use in fighting. The same remedial action of trespass *vi et armis*, at common law, and with us, trespass on the case, lies also to recover damages for this injury. (3 Bl. Com. 121; Com. Dig. Battery, (B), (E. 1).)

Remedies for these Five Wrongs; W. C.

1^l. Trespass *vi et Armis*.

The action of trespass *vi et armis* lies at common law only where the injury *results directly* from force applied by the wrong-doer, *whether wilfully or negligently*. (Leame v. Bray, 3 East. 593; Taylor v. Rain-

bow, 2 H. & M. 423; *Jordan v. Wyatt*, 4 Grat. 151; *Percival v. Hickey*, 18 Johns. 357; 1 Chit. Pl. 143. But see *ante*, p. 355.)

The purpose of the action, as we have seen, is to recover damages, as the best compensation which the nature of the case admits of. (3 Bl. Com. 120-21.)

2^d. *Trespass on the Case.*

Trespass on the case lies at common law only where the injury *results not directly* from the force applied by the wrong-doer. It is not, therefore, applicable in general to any of the wrongs named above, all of them being perpetrated with force direct. But in Virginia an action of trespass on the case is allowed in any case where trespass will lie. (V. C. 1873, c. 145, § 6.)

4th. *Wrongs Affecting the Health.*

Injuries affecting one's health may be brought about by selling one bad provisions or liquors, or adulterated drugs; by negligently supplying a deleterious drug or medicine instead of an innocent one, or one less hurtful; by the exercise of a noisome trade, which infects the air in the neighborhood; by the unskilful management of a physician or surgeon; or by nuisances of any kind. (3 Bl. Com. 122; 2 Rob. Pr. (2d ed.), 399.)

Remedy:

Trespass *on the case* to recover damages in order to compensate for the injury done. (3 Bl. Com. 122.)

Where the injury is irremediable by damages, a court of equity, if it may be anticipated, will restrain the commission or continuance of it by injunction. (2 Stor. Eq. § 925 & seq.) Thus, the erection of a mill-dam, which will occasion stagnant water, likely to generate *malaria*, and produce disease in one's family, may be prohibited by injunction, and in like manner the erection or continuance of any other nuisance. (*Miller v. Trueheart & als*, 4 Leigh, 572 & seq, 576, &c.)

5th. *Wrongs affecting the Reputation.*

Injuries affecting a man's *reputation* or good name are brought about in several modes, namely: (1), By malicious, scandalous, and slanderous *words*; (2), By printed or written *libels*, pictures, signs and the like; and (3), By malicious indictments or prosecutions. (3 Bl. Com. 123 & seq, and n's (9), (10), (13), and (14); 2 Rob. Pr. (2nd ed.) 600 to 617; Bac. Abr. Slander, and Libel;) W. C.

1^h. *Malicious, Scandalous, and Slanderous Words.*

At common law there is a distinction between scandalous words, that may subject one to the *penalties of the law*, may *exclude him from society*, may *impair his trade*, or may *affect a peer of the realm, a magistrate*, or

one in public trust, which words are said to be *actionable per se*, without alleging or proving any particular damage to have resulted from them; and words that do not thus apparently, and upon the face of them, import such defamation as will of course be injurious, in which case it is necessary that the plaintiff should aver some *particular damage to have happened*, which is called laying the damage with a *per quod*. This common law doctrine is by statute so altered in Virginia (V. C. 1873, c. 145, § 2), as that all words which, from their usual construction and common acceptance, are construed as insults, and tend to violence and breach of the peace, are *actionable per se*. In unfolding the subject, therefore, it will be proper to consider, (1), The doctrine at common law touching slanderous words; and (2), The doctrine in Virginia. See Bac. Abr. Slander. (D), 4; Id. (E); *White v. Nicholls*, 3 How. 266; *Dillard v. Collins*, 25 Grat. 351 & seq; *Post p.* ; W. C.

1¹. The doctrine at common law, touching slanderous Words.

And under this head, the topics will correspond to the division above suggested, namely: (1), Slanderous words *actionable per se*; and (2), Slanderous words *not actionable per se*; W. C.

1². Slanderous Words *actionable per se*.

Here also the division is that already indicated, that is, (1), Words imputing an *offence punishable in the secular courts*; (2), Words imputing some *contagious disorder*, calculated to exclude the party from society; (3), Words affecting one *in his trade or calling*; and (4), Words affecting a person's *capacity for an office or trust* held by him. (3 Bl. Com. 123-'4 & seq, & n's (9), and (10).)

In all these classes of cases an action of trespass on the case may be had, without averring or proving any particular damage to have happened, but merely upon the *probability that it might happen*. (3 Bl. Com. 124;)
W. C.

1¹. Words imputing an Offence *Punishable in the Secular Courts*.

In order to stand in this category, the words must impute an offence punishable in the *secular or temporal*, in contradistinction to the *ecclesiastical*, courts. The accusation must be precise in its terms, or have such a plain allusion to some prior transaction that

the hearers of the words must necessarily have understood that the slanderer meant to impute to the plaintiff the guilt of some punishable offence; for an *inuendo* or construction cannot be given to words which those words do not necessarily import, either of themselves, independently of any other circumstances, or with necessary reference to some other circumstances occurring at the time of the accusation, (James v. Rutleck, 4 Co. 17 b; Holt v. Scholefield, 6 T. R. 691; Hawkes v. Hawkey, 8 East. 427; Rax v. Horne, Cowp. 684; Barham v. Nethersal, 4 Co. 20 a.; Van Vechten v. Hopkins, 5 Johns. (N. Y.) 211, 220); in which latter case the meaning and office of an *averment*, a *colloquium*, and of an *inuendo* in actions of slander, are explained with precision and clearness by Van Ness, J.

Hence, it is not actionable to call one "*villain*," "*cheat*," "*rascal*," "*swindler*," or "*rogue*," or to say he is "*forsworn*," without a *colloquium* of some proceeding in a court of justice in which the party had been examined on oath, or of some transaction to which the opprobrious epithets were designed to relate. (Holt v. Scholefield, 6 T. R. 691; Hawkes v. Hawkey, 8 East. 427-'8; Stanhope v. Blith, 4 Co. 15 a & b; Savile v. Jardine, 2 H. Bl. 531.) However; if such expressions as those mentioned above, not actionable in themselves, are accompanied by a statement casting the imputation of some punishable crime on the party, and can only be understood by the hearers in that criminal sense, they are actionable. (Holt v. Scholefield, 6 T. R. 694); and on the other hand, words *prima facie* importing a charge of a punishable offence, as to call one a "*thief*," may be qualified by the accompanying expressions and other circumstances, so as to show that the charge was not designed to convey an accusation of *such a crime*. Thus, if the words be: "You are a thief, for you *stole my land*," or "you *stole my greyhound*," is not actionable *per se*, for the taking of those things is not a felony. And so where the witnesses called to prove the slander state that they believed that the defendant did not mean to charge the plaintiff with the crime which his words imported. (Brittridge's Case, 4 Co. 18 b, 19 a; Minors v. Lee-ford, 3 Cro. (Jac.) 114; Penfold v. Westcote, 1 Bos. & P. (N. R.) 335.)

At an early period, in order to discourage actions of slander, the courts adopted the maxim that words

should be taken *in sensu mitiori*. That doctrine, however, being found to increase the tendency to malicious defamation, was abandoned, and the more just and rational principle introduced, that words should be taken in the sense in which they were reasonably *understood by the bystanders*. (2 Rob. Pr. (2nd ed.) 603; Hoyle v. Young, 1 Wash. 152; Cave v. Shelor, 2 Munf. 194-'5.)

The accusation of a mere intent, propensity, or inclination to commit a crime is not *actionable per se* (Eaton v. Allen, 4 Co. 16 b; 3 Bl. Com. 123 n (9).) But to charge a person with *soliciting* another to commit a crime, which is itself a punishable offence, is actionable. (Eaton v. Allen, 4 Co. 16 b, n (B) and (D).)

A *verbal* imputation of a want of moral virtue, such as chastity, piety, &c., is not *per se* actionable. (Onslow v. Horne, 3 Wils. 186; Holt v. Scholefield, 6 T. R. 694; 2 Rob. Pr. (2nd ed.) 601; Edsall v. Russell, 4 Mann & Gr. (53 E. C. L.) 565; 3 Bl. Com. 123, n (9).)

2¹. Words Imputing a *Contagious Disorder*, calculated to exclude the Party from Society.

Man being formed for society, and standing in constant need of the advice, comfort, and help of his fellow-men, words imputing a disorder calculated to exclude one from the enjoyment of those advantages, constitute no small damage to the party, and if the imputation is false a very grievous injury. (Bac. Abr. Slander, (B); Villers v. Monsley, 2 Wills. 403, 404). The mere accusation of *having had* a disease, at common law is not actionable; for it is no reason why the company of the person so charged should be avoided. (Carslake v. Mapledoram, 2 R. R. 474-'5; Taylor v. Hall, 2 Str. 1189.)

3¹. Words affecting One *in his Trade or Calling*.

Words which impute the want of integrity or of capacity, whether mental, moral, or pecuniary, in the conduct of a profession, trade, or calling in which the party accused is engaged, are actionable. Thus, an action lies for accusing a clergyman of incontinence, whereby he may lose his employment, (Davis v. Gardiner, 4 Co. 17 a, & n (E); Demarest v. Herring, 6 Cow. 76); or a lawyer of inability, carelessness, or dishonesty, which must necessarily impair, if not wholly destroy, the gainfulness of his occupation, (3 Bl. Com. 123 n (9); Lewis v. Clement, 3 B. & Ald. (5 E. C. L.) 702; S. C. on ap-

peal in Excheq. Ch. 3 Bro. & B. (7 E. C. L.) 297); or a person in trade (however inferior), of fraudulent or dishonorable conduct, or of being in insolvent circumstances. (Terry v. Hooper, 1 Lev. 115; Stanton v. Smith, 2 Lord Raym, 1480; Bac. Abr. Slander, (B).)

4¹. Words affecting a Person's *Capacity for an Office* or Trust held by Him.

When *any emolument* is attached to the office or trust, words which impute unfitness, whether moral or intellectual, to discharge its duties, are actionable; but if the office is merely *honorary*, and not one of profit, such words are not actionable. (Aston v. Blagrave, 2 Lord Raym, 1369; How v. Prism, 2 Salk. 695; Stuckley v. Bulhead, 4 Co. 16 a; 3 Bl. Com. 123, n (9); 1 Rob. Pr. (2nd ed.) 606 & seq.)

2^{*}. Slandorous Words not *Actionable per se*.

Slandorous words which yet are *not actionable per se* are such as do not belong to either of the foregoing classes; in respect to which the common law requires an averment and proof of *special damage* in order to maintain an action therefor. The *special damage* sufficient to support an action must be a certain actual loss, as of a particular marriage; the acquaintance or friendship of some specified person; the loss of a situation; the loss of an inheritance, &c., (3 Bl. Com. 123, n (9); Bac. Abr. Slander, (C); 2 Rob. Pr. (2nd ed.) 605, & seq.). The principle is that there must be some certain, or at least probable, temporal loss or damage, which is a legal and natural consequence of the words spoken. (Onslow v. Horne, 3 Wils. 187; Vicars v. Wilcocks, 8 East.)

This sort of defamation is most likely seriously to affect clergymen, attornies, physicians, merchants, mechanics, and tradesmen. In respect to a *clergyman*, any imputation of gross immorality seems in England to be actionable *per se*, because ministers of the established church there *hold office* for which they are disqualified if the imputation be true. It may be doubted if the same doctrine, independently of statute, would prevail in this country; but if *any damage ensue*, as by the loss of a situation, the action would certainly lie. (2 Rob. Pr. (2nd ed.) 608, 610, 612; Chaddock v. Briggs, 13 Mass. 253; McMillan v. Brich, 1 Bin. (Pa.) 185; Demarest v. Herring, 6 Cow. (N. Y.) 76.)

An action may lie for *written words* (as being a *libel*) which, if *spoken only*, would not be actionable.

A number of examples of this distinction are stated in 2 Rob. Pr. (2nd ed.) 614-'15. It is illustrated by *Villers v. Monsley*, 2 Wils. 403, where an action was allowed for *libellous words written*, when it was agreed that no action could have been maintained had they been *only spoken*. The defendant had invoked the aid of the muse to give point to his vituperation, and with that help got off some very wretched lines, in which he characterized "Old Villers" as smelling of *brimstone*, and designated him as, "You old stinking, old nasty, old *üchy*, old toad," "Old Villers" did not so much mind the reference to *brimstone*, but the artistic climax of this line was too much for his patience. He instituted a suit for the libel, and got a verdict of *sixpence damages*; and then the defendant's counsel moved to arrest the judgment, on the ground that the words *were not actionable*; a motion which was overruled upon the distinction above stated, it being considered that, although they might not have been actionable if *merely spoken*, yet as *written*, they constituted a *libel*.

To call one a *bastard* is not actionable at common law, unless some special damage can be proved to have resulted, such as the loss of property which would otherwise have been given him; nor does an action lie at common law, for an imputation of want of chastity in a woman, except under like circumstances of special loss. (Bac. Abr. Slander, (C); *Davis v. Gardiner*, 4 Co. 166; *Vaughan v. Ellis*, 3 Cro. (Jac.) 213.)

The slander of one's *title to land*, or by parity of reason to *any other property*, is actionable where it occasions loss to the party complaining, and does not consist in the assertion of a title *in the party himself*. This latter, however unfounded it may be, and however injurious, is never the subject of an action; "for if an action should lie," says Lord Coke, "when the defendant himself claims an interest, how can any make claim or title to any land, or begin a suit, or seek advice or counsel, but he should be subject to an action?—which would be inconvenient." (*Gerard v. Dickenson*, 4 Co. 18 a; *Smith v. Spooner*, 3 Taunt. 246; *Hargrave v. Le Breton*, 4 Burr. 2424; Bac. Abr. Slander, (C).) There must also appear to be *malice* in the publisher of the objectionable words, either express or implied. But as malice is generally implied when the statement made derogatory to the title is *false*, so if it be true, the imputa-

tion of malice is repelled. (*Hargrave v. Le Breton*, 4 Burr. 2425; *Smith v. Spooner*, 3 Taunt. 246; *Pitt v. Donovan*, 1 M. & S. 639, 644 & seq.) The fact that the utterer of the words is in point of duty or interest (*e. g.* as trustee), concerned in the title of the property, and that his conduct may have been in consequence of the conviction that such duty or interest demanded his intervention, is a very strong consideration in his favor, and if he acts in good faith, entitles him to be excused; whilst, on the other hand, if he is a stranger, mixing himself up in matters that he has no proper concern with, and without authority from those who are parties in interest, he can claim a much less lenient construction, and can be acquitted only by proving what he said to be true. (*Hargrave v. Le Breton*, 4 Burr. 2424 & seq; *Pitt v. Donovan*, 1 M. & S. 646-'7 & seq; *Rowe v. Roach*; *Id.* 304, 309-'10; See 2 Rob. Pr. (2nd ed.) 617.)

2¹. Doctrine in *Virginia* touching Slanderous Words.

. It is enacted in Virginia by statute, (V. C. 1873, c. 145, § 2), that "all words which, from their usual construction and common acceptation, are construed as insults, and tend to violence and breach of the peace, shall be actionable. No demurrer shall preclude a jury from passing thereon." (V. C. 1873, c. 145, § 2.)

This statute (originally enacted Jany. 26, 1810) was immediately induced by the tragical result of a duel, which terminated in the death of a man whose abilities and character had won for him a high place in the esteem of the people of Virginia. It was an effort to arrest the vice of duelling, by substituting, in all cases of insult, a more unobstructed appeal to the law than had been previously allowed; and although this provision has had little effect in accomplishing the beneficent purpose designed, there was another contained in the same statute which has proved signally efficient, namely, that excluding from any office of honor, trust, or emolument, under the commonwealth, any one who should be in anywise concerned, as principal, second, aid or adviser, in any duel with mortal weapons. As the statute was first enacted, and as it remained down to 1850, it was provided, that "no *plea*, exception, or demurrer shall be sustained * * * to preclude a jury from passing thereon, who are hereby declared the sole judges of the damages sustained;" and under this state of the law it was held, in *Brooks v. Calloway*,

12 Leigh, 471-'2, that to an action *under the statute*, the truth of the imputation could not be *pleaded in bar of the action*, but could only be submitted to the consideration of the jury *in mitigation of damages*, under the general issue of "not guilty." And this proposition was re-affirmed in *Mosely v. Moss*, 6 Grat. 540-'41, in which it was also decided, that where the slander consists *only* in what is insulting, and alike insulting whether it be true or false, (*e. g.* in taunting the plaintiff with some secret bodily infirmity, or with a stain upon the family honor), it would or might be irrelevant *to prove the truth*, in which case evidence *tending* to prove it ought to be excluded. (S. C. 6 Grat. 546.)

There being such material differences between slander at common law, and slander under the statute as it was prior to 1850, it was inadmissible to join them in *the same count*, (*Mosely v. Moss*, 6 Grat. 541, 548-'9,) and therefore, where the several counts of a declaration charged an imputation by the defendant of the commission of acts of a penal character, *as at common law*, but the *colloquium* and *inuendoes* did not sufficiently explain the meaning of the imputation, so that, as a declaration for common law slander, it was liable to demurrer, it could not be helped by treating it as an action under the statute for an *insult only*. (*Mosely v. Moss*, 6 Grat. 547, 549 to 552.)

But the words of the statute, as (contrary to the recommendation of the revisors, Report, 871, n,) they were changed by the Legislature in 1850, are now essentially different from what they were when those cases were decided. The language now is, "No *demurrer* (not "*no plea, exception, or demurrer*,"") shall preclude a jury from passing thereon." And it seems clear, therefore, that the Legislature designed to change the previous policy, as expounded in those cases of *Brooks v. Calloway*, and *Moseley v. Moss*, and to allow and require the truth to be pleaded specially in *bar of the action*, as at common law. If so, the truth of the specific accusation cannot be given in evidence under the general issue in mitigation of damages, and much less can facts of bare suspicion, (*Underwood v. Parks*, 2 Stra. 1200; *Cheatwood v. Mayo*, 5 Munf. 16; *Mc-Alexander v. Harris*, 6 Munf. 465;) but the *general bad character* of the plaintiff may be proved, in order to reduce the damages; for not only is it no hardship on the plaintiff who "sues for his character" to be required to prove it to be in general good, should it

be assailed, but the plaintiff's *general character* is a necessary element in estimating the damages to be allowed him.

See *Mosely v. Moss*, 5 Grat. 542 to 544; *Bourland v. Eidson*, 8 Grat. 32 to 34.

2^h. Malicious, Scandalous, and Slanderous *Libels*.

A libel is a malicious *publication*, expressed either in printing or writing, or by signs or pictures, tending either to blacken the memory of one dead, or the reputation of one alive, and to expose him to public hatred, contempt, or ridicule. (2 Kent's Com. 17; Bac. Abr. Libel.)

Slander (or defamation *by words spoken*,) is not a public offence, but only a civil injury; but *libel* is both a public offence and a civil injury. It is deemed a public offence because it endangers the public peace by the bad passions it engenders, and also because the means adopted for its publication render it more injurious to the party wronged, and demonstrate a more deliberate and malignant intent in the offender. (Bac. Abr. Libel; 3 Bl. Com. 125-'6.)

W. C.

1^l. Libel as a *Public Offence*.

For libel as a *public offence*, the guilty party may be proceeded against by indictment or information; and as the tendency to a breach of the peace by the party libelled is at least as strong when the charge is true as when it is false, the defendant is not permitted, on an indictment, to allege the *truth of the charge* by way of justification; that is, of a *bar to the prosecution*, at least in general; but he is not denied an opportunity to prove the truth by way of *mitigating the punishment*. (3 Bl. Com. 126; Crim. Synops. 161 & seq, 163-'4; Bac. Abr. Libel, (A).) But we shall see that, as a private or *civil injury*, truth is as much and as conclusive an answer to a libel as it is to slander.

2^l. Libel as a *Civil Injury*.

What was said with regard to slanderous *words spoken*, will also hold in most particulars with regard to *libels* by writing or printing, and the civil action consequent thereupon; although it will be remembered that many vituperative and contemptuous expressions are allowed to be *libellous*, when at common law no action could be maintained for the same words *merely spoken*, (*Ante* p. 381-'2, &c. And as in slander, the application of the defamatory words must plainly appear, either by the unequivocal context, or by means of a *colloquium* and *inuendoes*, so also in libel, and espe-

cially in libel by means of signs or pictures, it is needful to show by proper *inuendoes* or averments of the defendant's meaning, the import and application of the scandal; but it seems that it is not requisite to aver any special damage, as at common law it is in the case of slander. (3 Bl. Com. 126 & n (13).) If, however, the plaintiff wishes to show that he sustained additional injury, in respect of a particular character which he filled, or in respect of other particular circumstances; entitling him to damages, it is necessary to aver those circumstances, or that he filled that character. (4 Rob. Pr. 739-'40; *May v. Brown*, 3 B. & Cr. (10 E. C. L.) 113; *Malachy v. Sopar*, 3 Bingh. N. C. (32 E. C. L.) 167.)

Referring to the definition of a libel, it will be perceived that the circumstances following must combine to constitute it, namely: (1), Defamatory matter; (2), In print or writing, or by signs or pictures; (3), A publication; (4), Without lawful occasion; (5), Falsity in the allegation; and (6), Malice;

W. C.

1st. Defamatory Matter to Constitute a Libel.

As every person desires the favorable regard of his fellow-men, and must be irritated and provoked by such ridiculous representations of him as tend to lessen him in the esteem of the world, and take away his reputation, which to many is hardly less dear than life itself; so it is held that not only such flagrant charges as reflect a moral turpitude on the party are libellous, but also such as set him in a scurrilous or ignominious light; for these latter, hardly less than the former, create ill blood and provoke revenge.

Thus, not only is it a libel to *print* of a person that he is a "swindler," or a "villain," but also that he "*has the itch*, and stinks of brimstone;" or to send to an eminent statesman a license to *keep a public house*. So it is a libel to publish of a man that he has been guilty of gross misconduct, and insulted females; or that a counsellor offered himself as a witness in order to divulge the secrets of his clients, or that a member of Congress was "a fawning sycophant, a misrepresentative in Congress, and a grovelling office-seeker." And so it is a libel to charge that the plaintiff is *insane*, that an officer has grossly violated his duty, that a judge lacks capacity, that a ship-owner's vessel was not seaworthy, or that the plaintiff has been deprived of the chief-ordinances of the church to which he be-

longs by reason of his infamous and groundless assertions. (Bac. Abr. Libel, (A.) 2; 4 Rob. Pr. 728 to 731.)

2^k. Libel must be *in Print or Writing, or by Signs or Pictures*.

Thus it is a libel to fix up a gallows at a man's door, or elsewhere, if he be connected with it, to paint him in a shameful and ignominious manner; *Du Bost v. Beresford*, 2 Campb. 511; to place a lamp before his house, and keep it burning all day, thereby intending to mark it as a bawdy house. And when there is any obscurity in the representation or description, the remarks of the spectators or readers, ascertaining the application and fixing it on the plaintiff, are admissible. (Bac. Abr. Libel, (A.) 1; *Jeffries v. Duncombe*, 11 East. 226; *Levi v. Milne*, 4 Bing. (13 E. C. L.) 195.)

3^k. A *Publication* of the Libel.

The author who writes, the printer who prints, the publisher of the journal in which it appears, the bookseller who sells, and in short, all who are concerned in giving publicity to the defamation, are alike guilty of the offence and of the civil injury of libel, as soon as *publication* thereof takes place. The *public offence* is consummated by sending the libel to the party himself, although no one else shall see it. But not so with libel as a *civil injury*. In order that an action may be maintained, it must appear to have been communicated to one or more *strangers*; and it must appear that those words either have necessarily the meaning of which the plaintiff complains, or that the person or persons to whom the libel was communicated reasonably understood them in that sense.

4^k. Without *Lawful Occasion*.

There are occasions when it is lawful and *justifiable* to publish what must tend to the disparagement of another's reputation; and there are yet other occasions, when, though *not justifiable*, it is *excusable* so to do, provided there be no *actual malice*. Let us consider then, severally, some of the cases where the publication of defamatory matter is, (1), *Justifiable*; and (2), *Excusable*; observing that the same distinction, and most of the propositions, are as well applicable to slander as to libel;

W. C.

1^l. Where Defamatory matter is *Justifiable*.

There are cases where public policy demands that there should be a free and unrestrained ex-

pression of opinion and belief, as well as of fact; and in order that that result may be attained, all apprehension of a public prosecution or private action as for a libel, or of a private action as for slander, is removed; and that without regard to the fact that the publication may have been ever so false, or ever so malicious.

The most conspicuous instances of *justifiable* disparagement of character are the following; in all of which it must be noted, that if the publication is made more notorious than the considerations which justify it require, the protection ceases as to the excess, and the party is liable therefor:

1, The language of *counsel*, in conducting a cause, if it be *relevant* to the matter in hand, and agreeable to his instructions, is not actionable; and it seems the *prima facie* presumption is that whatever he says is in conformity with his instructions; but he may not afterwards *publish to the world* the defamatory statements made as counsel;

2, So the language of a *judge or court*, in the discharge of official duty, is not actionable. Nor are the *proceedings in courts* generally, however injurious to character. Nor any statements made in the *course of administering justice*, *e. g.* in the way of complaints of wrong, evidence as a witness, presentments of grand juries, &c.

3, So the language of a *member of the legislature*, in the discharge of his official duty, is not actionable, although his subsequent *publication* of it to the world would be.

4, Nor is a *petition to the legislature*, nor doubtless to any department of government, *bona fide* for relief from a grievance.

5, Nor the reports of the proceedings of the legislature, or of the courts, if *bona fide*, fair and unvarnished, and *without comments*, provided they be not of a *blasphemous and indecent* nature. But not where judicial proceedings are *preliminary*, and suppose the probable necessity of further investigation, as those before a coroner, or a justice of the peace, upon a question of commitment to prison of a party accused.

See Bac. Abr. Slander, (D) 4; Id. (E); Id. Libel, (A) 2, 4; 3 Bl. Com. 123, n (9); Synops. Crim. Law, 162-'3; White v. Nichols, 3 How. 266; Dillard v. Collins, 25 Grat. 351 & seq.

2. When the Defamatory Matter is *Excusable*.

These are cases where public policy does not so strongly require the free and unrestrained utterance of one's sentiments, and of disparaging facts; and the law, therefore, contents itself with *excusing*, without *justifying* it; and excusing it only where there is no *actual malice* proved. But let it be observed, that where *actual malice is proved*, the words are not shielded by the occasion, but are actionable.

Thus, defamatory matter is not actionable in the absence of actual malice:

1, Where the publication is *unintentional*.

e. g. That the writing was delivered *without knowing its contents*, or *by mistake* in good faith, for another paper.

2, Where the publication was made in the *bona fide* discharge of a *moral duty* to society.

e. g. Giving a *character to a servant*, &c.; making confidential communications *in good faith* by or to a person interested; by way of admonition or advice, or in the confidence of friendship; for redress of supposed public abuses to persons having power to reform them; to afford the party *in good faith* an opportunity to exculpate himself; in the course of discipline of church, and other voluntary associations; warning *in good faith* against swindlers; in promotion *in good faith*, or in assertion of a party's own *rights*.

3, Where the publication is a fair, candid and *bona fide* criticism, or examination of any work, or performance of literature, science, or art, and of the qualifications, merits or competency of the author.

4, Where the publication is a fair, candid, and *bona fide* comment on any places or species of public entertainment, or of public performance; and in case of

5, Fair and honest animadversion on persons who hold, or who are candidates for public office.

See Bac. Abr. Slander, (D), 4, 5, (E); Id. Libel, (A), 2, 4; 3 Bl. Com. 123, n (9); Crim. Synops. 162-'3; Dillard v. Collins, 25 Grat. 351 & seq; White v. Nicholas, 3 How. 266.

5^k. Falsity of the Allegations.

To render an imputation against the character actionable, it must in general be *false*, although the falsity will usually be implied, (upon the general presumption of innocence), until the contrary is proved. And if the defendant proposes to avail

himself of the truth, he must plead it specially, and cannot be suffered to prove it under the *general issue* of *not guilty*; although, under that general issue, he may prove the plaintiff's *general bad character*, as we have seen he may do in slander. (Bac. Abr. Libel. (A), 5; 3 Bl. Com. 123, n (9).)

6^k. Malice.

A *malicious motive* is essential to the support of an action, whether of slander or of libel; but malice is always to be presumed when one says or writes of another what tends to defame him, and yet *is not true*; except in the cases already mentioned, where, from considerations of public policy, the utterance is either *justifiable*, or at least *excusable*; observing that, in the latter class of cases, whilst *prima facie* the presumption of malice, which otherwise would grow out of the *falsity* of the statement, is repelled by the occasion, yet, if *actual malice* be proved, the wrongdoer is not protected against the action. (3 Bl. Com. 123, n (9); Bac. Abr. Slander, (D), 5; Lamb's Case, 9 Co. 59, b; Rogers v. Clifton, 3 Bor. & P. 587; Bromage & al. v. Prosser, 4 B. & Cr. (10 E. C. L), 247; Pasley v. Freeman, 3 T. R. 61; Hargrave v. LeBreton, 3 Burr. 24, 25; Dillard v. Collins, 25 Grat. 351, & seq.)

In Bromage v. Prosser, 4 B. & Cr. 247, *supra*, is a very clear exposition of the *legal* doctrine of malice by Bayley J. which is worthy of the student's attention. "Malice, in common acceptation," says he, "means *ill will against a person*; but in its *legal sense* it means a *wrongful act done intentionally without just cause or excuse*. If I give a perfect stranger a blow likely to produce death, I do it *of malice*, because I do it *intentionally*, and without just cause or excuse. If I maim cattle without knowing whose they are, if I poison a fishery without knowing the owner, I do it *of malice*, because it is a wrongful act, and done intentionally. * * * And if I traduce a man, whether I know him or not, and whether I intend to do him an injury or not, I apprehend the law considers it as done *of malice*, because it is wrongful and intentional. It equally works an injury, whether I meant to produce an injury or not, and if I had no legal excuse for the slander, why is he not to have a remedy against me for the injury it produces? And I apprehend the law recognizes the distinction between these two descriptions of malice, *malice in fact* and *malice in law*, in actions of slander. In an or-

dinary action for words it is sufficient to charge that the defendant spoke them *falsely*; it is not necessary to state that they were spoken *maliciously*."

Hence, it follows that a slander or libel may as well be in the form of *insinuation* as of *positive assertion*. Thus, to write to the plaintiff: "As you will *make considerable by being summoned to court*, I would advise you to go and pay G. B. the balance you owe him for *his wild hogs you killed*," is libellous; and so also it is to say, "I hope you will *stop swearing lies* about the trees. I will close this letter by advising you either to *quit lying or preaching one*." (Adams v. Lawson, 17 Grat. 255-'6.)

This case presents very distinctly the doctrine as to what amounts to the *publication of a libel*; and it was held that to constitute a publication so as to maintain an action, it is not necessary that the contents of the writing should be made known to the public generally. It is enough if they are made known *to a single person*. Thus, in the case of Adams v. Lawson, defendant in the court below (Adams), had gotten one Woolwine to write the libellous letter complained of, and had signed his name thereto, and afterwards stated to several persons that he had done so, and also the contents of the letter. This was held satisfactorily to prove a *publication*: *first*, to and in the presence of Woolwine, who penned the letter at the defendant's request and dictation in his presence; and *secondly*, to and in the presence of the several witnesses to whom he made the statement above set forth; and in confirmation of these propositions the court cited King v. Burdett, 4 B. & Ald. (6 E. C. L.), 143; Case *de libellis famosis*, 5 Co. 128 a; Lamb's Case, 9 Co. 59 b; See also Baldwin v. Elphinstone, 2 Wm. Bl. 1037.

It may further be added that whilst the tendency of the English courts is to exclude testimony of the plaintiff's *general good character*, introduced as part of his case, compelling him to rely upon the presumption of law that every man's character is good until the contrary is proved. (2 Stark. Ev. 218; Cornwall v. Richardson, Ry. & Moody, (21 E. C. L.) 305, *Contra* King v. Waring & ux, 5 Esp. 13); yet in the United States, it seems to be the *prevailing*, as it is the more reasonable doctrine, that the plaintiff's *general character* is involved in the issue, and that, therefore, evidence showing it to be *good or bad*, and consequently of much or little value, may be offered

on either side to affect the amount of damages. (2 Greenl. Evid. § 275; *Gilman v. Lowell*, (8 Wend. 578,) 207; *McNutt v. Young*, 8 Leigh, 542; *Lincoln v. Chrisman*, 10 Leigh, 338; *Adams v. Lawson*, 17 Grat. 259-'60.) And it seems that with us in Virginia, the defendant is not confined in his proof of the *bad character* of the plaintiff, to the particulars embraced in the alleged imputation. (*Lincoln v. Chrisman*, 10 Leigh, 342 to 345; *Adams v. Lawson*, 17 Grat. 260.)

3^h. Wrongs to the Reputation by *Malicious Indictment or Prosecution*.

A third way of injuring one's reputation is by preferring *malicious indictments or prosecutions* against him, which, under the mask of justice and public spirit, are sometimes made the engines of private spite and enmity. (3 Bl. Com. 126.)

Malicious prosecutions are of a *criminal* or *civil* nature, so that the observations upon the subject will relate to, (1), Malicious prosecutions of a *criminal nature*; and (2), Malicious prosecutions of a *civil nature*; W. C.

1ⁱ. Malicious prosecutions of a *Criminal Nature*.

To enable one to support an action for a *criminal prosecution*, four circumstances must concur, namely:

1st, Falsehood in the charge preferred by defendant;

2nd, Want of probable cause for instituting it;

3rd, Malice in the prosecutor; and

4th, Damage to the party accused;

W. C.

1^k. Falsehood in the Charge preferred by the Defendant.

It is indispensable that the falsehood of the charge should have been *ascertained* by a verdict, or by the *decision of the court* in which it is instituted; or by the proceedings having been otherwise legally determined before the party aggrieved can properly commence his action for the injury sustained. (3 Bl. Com. 126, n (14); *Skinner v. Gunton & als*, 1 Saund. 228, n (1,) 229; *Kirk v. French*, 1 Esp. 80; *Arundell v. Tregone*, Yelv. 116; *Barnes v. Constantine*, 3 Cro. (Jac.) 32; *Watner v. Freeman*, Hob. 267 a; *Darby v. Watson*, 2 Wm. Bl. 1050; *Morgan v. Hughes*, 2 T. R. 225; *Fisher v. Briston*, 1 Dougl. 215; *Young v. Gregorie & al*, 3 Call, 452, 454.)

The acquittal may be on a defect in the indictment, and the action will still be maintainable, for a bad indictment serves the purposes of malice by *put-*

ting the party to expense, and exposing him to disgrace; albeit, such a termination of the case may seriously impair the *quantum of damages*, as compared with an acquittal on the merits. (Chambers v. Robinson, 2 Stra. 691; Wicks v. Fentham & al, 4 T. R. 247; Pippet v. Heam, 5 B. & Ald. (7 E. C. L.) 684.)

The maliciously obtaining a *search warrant* to search one's house for goods alleged to be stolen, smuggled, &c., is such a prosecution that an action lies for it. (Elace v. Smith, 7 D. & Ryl. (16 E. C. L.) 97; S. C. 2 Chit. (18 E. C. L.) 304.) And it is also ground of action that a superior *military officer* imprisons an inferior, (both being under martial law), for disobedience to an order made under color, but *not within the scope* of military authority. (Warden v. Bailey, 4 Taunt. 88-'9.) Whether, if the order were within the military authority of the superior, and the inferior officer were acquitted by court-martial of the disobedience alleged, the latter could maintain an action for malicious prosecution against his superior, may be yet a question; although it seems to have been the opinion of Lords Mansfield and Loughborough, in the great case of Sutton v. Johnstone, 1 T. R. 549-'50, that such an action is not maintainable, but that the only redress is through a court-martial, upon charges preferred by the inferior. But in the House of Lords, where that case was finally decided, the judgment was put upon the ground that Admiral Johnstone had *probable cause* for arresting and suspending Captain Sutton, (notwithstanding the captain was afterwards acquitted by court-martial), for disobedience of orders in a general engagement between the English and French fleets, in the year 1781, in Port Praya bay, off the island of St. Iago. (Warden v. Bailey, 4 Taunt. 58-'9; A. D. 1811.)

2^k. Want of Probable Cause for instituting the Prosecution.

No action lies unless the prosecution be begun *without probable cause*, and therefore it is necessary to aver in the declaration the want of such cause, which, as is observed by Buller J., in Morgan v. Hughes, 2 T. R. 231, "is the *gist of the action*." (Reynolds v. Kennedy, 1 Wils. 233; Sutton v. Johnstone, 1 T. R. 544-'5; Broad v. Ham, 6 Bingham's N. C. (35 E. C. L.) 722; Ellis v. Thilman, 3 Call. 3; Kirtley v. Deck, 2 Munf. 10; Young v. Gregorie, 3 Call. 446;

Marshall v. Bussard, Gilm. 9; Spengler v. Davy, 15 Grat. 381; 4 Rob. Pr. 667.)

The question of *probable cause* is a mixed proposition of law and fact. Whether the circumstances alleged to show it probable or not probable, are true and existed, is a matter of fact; but whether, supposing them true, they amount to a probable cause, is a question of law. (Reynolds v. Kennedy, 1 Wils. 232-3; Sutton v. Johnston, 1 T. R. 545; Farmer v. Darling, 4 Burr. 1974; Ravenga v. Mackintosh, 2 B. & Cr. (9 E. C. L.) 693.)

3^d. Malice in the Prosecutor.

Malice in the prosecutor is also essential to the maintenance of an action; but such malice may, and in general must be, proved by inference or collateral proof, rather than by direct positive evidence. And wherever there is established a want of probable cause, the inference of malice is well nigh unavoidable, although the converse is not true, namely, that proof of malice justifies the presumption of the want of probable cause; for a man from a *malicious motive* may institute a prosecution for real guilt, or he may from circumstances which he really believes, proceed upon apparent guilt; and in neither case is he liable to this kind of action. (Sutton v. Johnstone, 1 T. R. 518, 545.) On the other hand, malice is not to be inferred from the *quashing of the indictment*, or from the plaintiff's acquittal in consequence of the *prosecutor's not appearing* against him, or from the indictments being *returned not found* by the grand jury; but in these, and like cases, the plaintiff must prove *extrinsically* the want of probable cause. (Hunter v. French, Willes, 520 & n (b); Purcell v. McNamara, 1 Campb. 200, 202, & n (a), 203 & n (a); 206 & n (a); S. C. 9 East. 361 & n (a); Byne v. Moore, 5 Taunt. 187.) And in all cases, not only in those just mentioned, but in all others, how express and direct soever may be the proof of actual malice, the defendant may repel any liability on his part, by showing sufficient grounds of suspicion in point of fact. (Coxe v. Wirrell, 3 Cro. (Jac.) 194; 3 Bl. Com. 126, n (13.) See Mowry v. Miller, 3 Leigh, 561; 2 Rob. Pr. (2nd ed.) 596.)

4th. Damage to the party Accused.

Damages, actual or implied, are essential to the support of every civil action; but there are three descriptions of damage, either of which is sufficient, namely: 1st, To the person *by imprisonment*; 2nd,

To the reputation *by scandal*; and 3rd, To the property *by expense*; or as it is expressed in *Savil v. Roberts*, 1 Salk. 14; S. C. 1 Ld. Raym. 374, one of the leading cases on the subject,—“If a man be *falsely and maliciously* indicted of any crime that may *prejudice his fame and reputation* he may bring his action, for he is *falsely scandalized* by the malice of the prosecutor, and this is a damage for which the law gives an action. So if a man be *falsely and maliciously* indicted of a crime that subjects him to *peril of life or liberty*, and for which he may be punished, he may bring his action; for he is endangered in this respect, and receives a damage for which the law gives an action. So if a man be *falsely and maliciously* indicted, though it neither touch his fame nor liberty; for it is *injurious to his property* in putting him to a needless expense, and a damage to one's property will maintain an action as well as a damage to his fame or person.” To the same effect are *Jones v. Gwynne*, Gilb. Rep. 185; and *Smith v. Hixon*, 2 Stra. 977. But *Byne v. Moore*, 5 Taunt. 187, is not wholly in accord with this doctrine. That was an action for a malicious prosecution for an *assault*, in which the grand jury refused to find a true bill against the plaintiff, whereupon the plaintiff brought his action, and at the trial adduced no evidence but the bill of indictment for the assault, with the grand jury's endorsement of *ignoramus* thereon, when he was non-suited for insufficient proof; and upon a rule to set that non-suit aside, the court of C. B. without adverting to *Jones v. Gwynne*, or *Smith v. Hixon*, held the non-suit to be right, on the ground that “he could recover no damages, because he clearly has not proved that he has sustained any.” “I can understand,” says Chief-Justice Mansfield (not *Lord Mansfield*), “the ground upon which an action shall be maintained for an indictment which contains scandal; but this contains none, nor does any danger of imprisonment result from it.” But is it not discreditable to one to be charged with an assault, and to be arrested therefor, to be brought before a justice of the peace and required to find sureties for his appearance to answer an indictment? and is it not injurious to him in a pecuniary aspect, thus to lose time, to be put to trouble, and as the jury might properly have inferred, to expense? The true doctrine is believed to be that laid down so circumstantially in *Savil v. Roberts*, and confirmed

with emphasis, in *Jones v. Gwynne and Smith v. Hixon*.

In order to prevent the discouragement of prosecutions for crime, at least in the case of *felonies*, it was long the established rule in England that actions of this character could not be carried on without a copy of the record of acquittal, which the court would not grant if there was any, the least probable cause to found the prosecution upon. (3 Bl. Com. 126 & n. (13); *Greenvelt v. Burrell*, 1 Ld. Raym. 253; *Morrison v. Kelley*, 1 Wm. Bl. 385.) This rule, however, never prevailed, even in England, in respect to prosecutions for misdemeanors, or even for felonies, where the indictment was never found, or was before a court having no jurisdiction, or was quashed in consequence of having been insufficiently drawn. (3 Bl. Com. 126-'7 & n. (13); *Morrison v. Kelley*, 1 Wm. Bl. 385.) In *Brangan's Case*, 1 Leach, Cr. Cas. 27, this rule is reprobated by Willes, C. J., who says: "By the law of this realm every prisoner, upon his acquittal, has an undoubted right and title to a copy of the record of such acquittal, for any use he may think fit to make of it." And it seems to be agreed, that if a copy be obtained, although surreptitiously, however the officer may be punishable, as for a contempt of court for furnishing it, the copy must be admitted in evidence. (*Jordan v. Lewis*, 2 Stra. 1122; *Legatt v. Tollervey*, 14 East. 302, 305, and n. (a).) Seeing, therefore, that this rule is merely the regulation of English courts, and not a *rule of law*, it exists in this country only where it has been *legally adopted*, as it has not been in Virginia; so that with us a copy of the indictment, and of the judgment of acquittal, are always to be had.

2^d. Malicious Prosecutions in Civil Suits.

Malicious proceedings in civil suits are by malicious arrests, malicious attachments, malicious institution of proceedings in involuntary bankruptcy, &c.

Before the statutes entitling the defendant to costs, (23 Hen. VIII, c. 15; 4 Jac. I, c. 3, &c.) which gave the defendant, if he prevailed, the same costs, as the plaintiff had long been allowed, in case he recovered, (3 Bl. Com. 399, 3 Th. Co. Lit. 219, n. (P.); *Id.* 12, n. (13),) the defendant if the suit terminated in his favor, might support an action against the plaintiff where the proceeding was *malicious and without probable cause*, (3 Th. Co. Lit. 12, n. (13); *Webster v. Haigh*, 3 Lev. 210-'11; *Waterer v. Freeman*, Hob.

267; *Goslin v. Wilcock*, 2 Wils. 302, 305-'7); although there are some strong authorities to the effect that a man "shall not be punished for suing of writs in the king's court, *be it of right or wrong*." (3 Th. Co. Lit. 11; *Ld. Beauchamps v. Sir Rich'd Croft & als*, 3 Dyer, 285 a; *Buckley v. Wood*, 4 Co. 14 b); and Mr. Hargrave in his note to 3 Th. Co. Lit. 11 (n 13), expresses the opinion that such actions were not, in general, allowed in the reign of Elizabeth. However this may have been, it seems certain that since 4 Jac. I, c. 3, allowing costs to defendants, no action can be maintained merely in respect of a civil suit maliciously instituted, except where a special grievance is shown to have ensued. (*Savil v. Roberts*, 1 Salk, 14; S. C. 1 Ld. Raym. 374.) Hence no action is maintainable for a vexatious ejectment (*Purton v. Honnor*, 1 Bos & Pul. 205); nor for any other vexatious suit, unless where the defendant has resorted to some *extraordinary proceeding* which has occasioned the plaintiff an injury other than mere extra costs, and has also acted *maliciously* (*Sinclair v. Eldred*, 4 Taunt. 7); but where the plaintiff in a civil action has *maliciously* adopted a step not absolutely necessary, but only auxiliary to the maintenance of his right, as in case of an unfounded *arrest*, or demand of *bail*, (*Skinner v. Gunton*, 1 Saund. 228); or of bail for more than the plaintiff knew was due, (*Dowse v. Swayne*, 1 Lev. 275); or where in the account between the plaintiff and defendant there are items *clearly due on both sides*, an arrest is made for the whole demand on one side without deducting the other, (*Dronefield v. Archer*, 5 B. & Ald. (7 E. C. L.) 513; *Austin v. Debnam*, 3 B. & Cr. (10 E. C. L.) 139); in all these cases an action lies for the party injured. (*Goslin v. Wilcock*, 2 Wils. 306-'7.) So also, an action lies for *maliciously and without probable cause* suing out an *attachment*, and causing it be levied on the plaintiff's property. (*Shaver & als. v. Daugherty*, 6 Munf. 110; *Spengler v. Davy*, 15 Grat. 381; *Young v. Gregorie*, 3 Call. 446; *Marshall v. Bussard*, Gilm. 14; *Pulliam v. Aler*, 15 Grat. 54.)

As it is necessary that the avenues of justice should not be narrowed, the courts do not encourage actions for malicious suits, and therefore, in all cases require *malice* and the *want of probable cause to be alleged and proved*, (*Goslin v. Wilcock*, 2 Wils. 307; *Young v. Gregorie & al*, 3 Call. 446; *Kirtley v. Deck & als*, 2 Munf. 10; *Crabtree v. Horton*, 4 Munf. 59; *Maddox v.*

Jackson, 4 Munf. 462; Marshall v. Bussard, Gilm. 14; Mowry v. Miller, 3 Leigh, 561; Spengler v. Davy, 15 Grat. 387, & seq); but a civil suit not being like a criminal prosecution, carried primarily for the benefit of the public, less favor and indulgence is to be shown to a plaintiff who maliciously arrests another, than to the prosecutor of an indictment. (3 Bl. Com. 126, n (13).)

In order to maintain such actions these four circumstances must concur, namely:

1st, Falsehood in the demand; 2nd, Want of probable cause; 3rd, Malice in the defendant; and 4th, Damages by arrest, imprisonment, or seizure of goods; W. C.

1*. Falsehood in the Demand.

With regard to falsehood in the demand, (whether in whole or in part) the rules applicable to a criminal proceeding equally affect a civil suit. Thus, the action complained of as malicious *must be determined* before any suit can be brought therefor. (Robins v. Robins, 1 Salk. 15, 16; S. C. 1 Lord Raym, 503; Bird v. Line Com. Rep. 193; Fisher v. Briston & als, 1 Dougl. 215; Kirk v. Frendi, 1 Esp. 80; Webb v. Hill, 3 Carr. & P. (14 E. C. L.) 485; Atkinson v. Raleigh, 3 Ad. & El. N. S. (43 E. C. L.) 79; Craig v. Hassel, 4 Ad. & El. (45 E. C. L.) 481; Young v. Gregorie & al, 3 Call. 446; 4 Rob. Pr. 671-'2.)

2*. Want of Probable Cause.

As in criminal, so in civil proceedings complained of as malicious, *want of probable cause* is a necessary element in order to support the action, and the same rules prevail with regard to it. (*Ante*, p. 393, &c; Young v. Gregorie, 3 Call. 446; Kirtley v. Deck, 2 Munf. 10; Crabtree v. Horton, 4 Munf. 59; Maddox v. Jackson, 4 Munf. 462; Shaver & al v. Daugherty, 6 Munf. 110; Mowry v. Miller, 3 Leigh, 561; Marshall v. Bussard, Gilm. 9, 14; Spengler v. Davy, 15 Grat. 381; Flight v. Leman, 4 Ad. & El. N. S. (45 E. C. L.) 887-'8; Tebbutt v. Holt, 1 Carr. & Kim. (47 E. C. L.) 288; Bicknell v. Davison, 16 Pick. (Mass.) 488; 4 Rob. Pr. 671, 667.) But where there is *reasonable ground* to apprehend that the sum claimed by the plaintiff is really due, or that otherwise the cause of the action or proceeding is as alleged, no action can be supported, notwithstanding in point of fact the demand asserted may turn out to be unfounded. (Jackson v. Burleigh, 3 Esp. 35-'6.)

Probable ground, as we have seen, is a mixed question of law and fact. If the facts are ascertained by the pleadings, or by the mutual agreement of the parties, the law may be properly determined by the court; but it is improper, where the facts are not thus ascertained, for the court to instruct the jury (otherwise than *hypothetically*), that there is or is not probable cause which ought to be submitted to the determination of the jury. (*Ante*, p. 394, and cases cited; *Crabtree v. Horton*, 4 Munf. 59; *Maddox v. Jackson*, 4 Munf. 462.) On the other hand, it is not error for the court to tell the jury, that the plaintiff's commitment by a justice of the peace, or being bound over to answer an indictment, is in a criminal proceeding, *evidence of probable cause*, notwithstanding it is only *prima facie* evidence, and may be repelled by contrary evidence on the part of the plaintiff. (*Maddox v. Jackson*, 4 Munf. 462.)

If one lays all the facts of the case *fairly* before counsel, and acts *bona fide* upon the opinion given by that counsel, (however erroneous the opinion may be), he is not liable to an action of this description. But it is always a question for the jury whether he did act *bona fide* on the opinion, believing that he had a cause of action; and if it appear that he did not so act, the action lies against him. (*Ravenga v. Mackintosh*, 2 B. & Cr. (9 E. C. L.) 693.)

3*. Malice in the Defendant.

The same general principles hold here as in the case of criminal proceedings. Malice is as essential an ingredient in the cause of action as the want of probable cause, and both are *indispensable*. (*Spengler v. Davy*, 15 Grat. 387-'8; *Sutton v. Johnstone*, 1 T. R. 545; *Nicholson v. Coghill*, 4 B. & Cr. (10 E. C. L.) 21.)

But malice is commonly implied from the want of probable cause, as is obvious from the nature of *probable cause*, which is defined to be "reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in his belief that the person accused is guilty of the offence with which he is charged, or is liable to the action brought against him." (*Manns v. Dupont*, 3 Wash. Circ. Ct. Rep. 31; 1 Am. L. C. 213.) Of course a rational understanding can infer nothing else, at least *prima facie*, from a *wrongful act* based on no *reasonable ground*, than that the doer

of it was instigated by malice. (Spengler v. Davy, 15 Grat. 381.)

Thus, where one receives the money due him, or releases the debt, and then, with full knowledge that he has no cause of action, notwithstanding issues process, upon which the pretended debtor is liable to be arrested, failing of course in his suit he is liable to this action, and malice is presumed unless he can show the contrary. (Waterer v. Freeman, Hob. 267.) But where the plaintiff, having sued out his process, *then receives his money*, but omits to countermand the execution of the writ, and it is executed, there must be some additional proof of malice, his *omission merely* not implying it. (Scheibel v. Fairbain, 1 Bos. & Pul. 391-'2.) And in another case it was held, that even though *after payment* of the debt, an *alias process* of arrest was sued out by the *creditor's attorney*, (we must suppose without the creditor's knowledge), it still afforded no evidence *per se* of malice, but that, in order to maintain the malicious prosecution, it was necessary to supply some further proof of actual malice, (Gibson v. Charters 2 Bos. & Pul. 129), a doctrine which was reiterated in Page v. Whipple, 3 East. 314.

In these cases *nothing wilful is done*. Defendant only *omits to do something*, for which it is as much the other party's business, and more his interest, to provide, as it is the creditor's; which, indeed, it is said, the creditor is under no obligation to do at all.

Omission to appear to prosecute the proceeding complained of is not of itself proof that the party was conscious of having no probable cause, and, therefore, evidence of malice; but actual malice must be proved, (Purcell v. Mamamara, 9 East. 361; S. C. 1 Campb. 199); and by parity of reason a *non pros*, (that is, an entry on the record that the plaintiff fails to prosecute his cause, which is, therefore, dismissed), is no evidence of malice in the prosecutor in instituting the suit. (Sinclair v. Eldred, 4 Taunt. 10.) But where the plaintiff in the prosecution complained of as malicious, issued a writ, with affidavit *for arrest*, December 7, did not declare until he was ruled so to do by the defendant; and then, on the 31st of December, *discontinued* the action, it was determined that the circumstances constituted *prima facie* evidence of malice, proper to be considered by the jury. The *voluntary abandonment* of the action, (something more positive than the mere omission to prosecute

it), and the *short time* which elapsed before its dismissal, (excluding the probability that anything had occurred, or been discovered in the *interim* affecting his ability to prove his cause of action, if he could have done it *at first*), constituting the difference between this and the cases preceding. (*Nicholson v. Coghill*, 4 B. & Cr. (10 E. O. L.) 21.)

Process was sued out *by mistake*, and notice of it was given to the defendant therein, but no arrest was made, and the mistake being discovered, the defendant was told that he need give himself no trouble, which however he chose to do, and incurred costs to the amount of £14. It was held that the circumstances warranted no implication of malice, but that actual malice must be proved. (*Bieten v. Burridge & als*, 3 Campb. 139.)

4^a. Damage to the Plaintiff by Arrest, Imprisonment, Seizure of Goods, &c.

In civil proceedings the party's *reputation* is in general not affected, and as to the expense of defending himself against such proceedings, he is supposed to be reimbursed by the costs which he recovers, although, in fact, the costs allowed are rarely equal to the expenditure incurred by a defence; so that the only damage he is likely to suffer from a malicious civil suit is from the arrest and imprisonment of his person, or by the seizure of his goods, as in case of attachment, &c. (1 Bl. Com. 126, n (13); Sedgw. Dams. 82, 93, 96. But see 2 Greenl. Ev. § 456.)

Remedies for *Wrongs to the Reputation*; W. O.

1^a. Trespass on the Case.

This is the universal remedy in practice. By it *damages* are recovered, such as a jury shall estimate will make amends, as far as damages may, for the injury sustained by the sufferer. (2 Greenl. Ev. § 253 & seq, § 420, § 456; Sedgw. Dam's, 83, 93, 539 & seq.)

2^a. Writ of Conspiracy.

The *writ of conspiracy* is an ancient writ, still subsisting theoretically, but for several generations superseded in practice by the more convenient remedy of an action on the case just mentioned. It supposes always, that *two or more* are concerned in the doing of the wrong; so that, if it should appear that all but one of the defendants are not guilty, he too must be acquitted, how plain soever his guilt. In the writ of conspiracy, as in the action of trespass on the case, the recovery is in damages, such as in the estimation of the jury will afford as adequate an equivalent as may

be for the injury done, and at the same time will tend to discourage the *repetition of such wrongs*. (Fitzh. Nat. Brev. 260.)

2^d. Wrongs done to *Personal Liberty*, and Remedies therefor;
W. C.

1st. The Nature of the Wrong.

There is but one injury which can be done to the right of personal liberty, and that is *by false imprisonment*, or the unlawful confinement of the person, and restraint of natural freedom of locomotion, in *any manner*. (3 Bl. Com. 127.)

The authority which may make the confinement lawful, may arise either from some process of a *court of justice*, or from some warrant from a legal officer having power to commit, under his hand and seal, and expressing the cause of such commitment; or from some other special cause, warranted for the necessity of the thing, either by common law or statute, such as the arresting of a felon by a private person without warrant, &c. And it will be observed that it enters into the idea of false imprisonment, that it may arise not only by making an arrest without lawful authority or warrant, but also by executing a lawful warrant or process at an *unlawful time*, as (in civil cases) on a Sunday. (3 Bl. Com. 127.)

2^d. The Remedies for the Wrong.

Let us next see the remedies, which are of two sorts; the one for *removing the injury*, the other for the purpose of *obtaining satisfaction* for it. (3 Bl. Com. 128);

W. C.

1^h. The Means of Removing the False Imprisonment.

The means of *removing* the actual injury of false imprisonment are fourfold: (1), By writ of *mainprise*; (2), By writ *de odio et atia*; (3), By writ *de homine replegiando*; and (4), By writ of *habeas corpus*;

W. C.

1^l. The writ of *Mainprise* (or Manucaption.)

The writ of *mainprise* (*main-pris*, manu-captio) is a writ issued in England *out of the chancery*, and with us out of any court that has authority under the circumstances to admit to bail, directed to the sheriff where one has been imprisoned for a bailable offence, and bail has been refused by the officer, or by the committing magistrate, or where the offence is not properly bailable by such subordinate, commanding the sheriff to take sureties for the prisoner's appearance, usually called *mainpernors*, and to set him at large. (3 Bl. Com. 128; Jac. Law. Dict. *in verbo*; Fitz. N. Br. 249 & seq.)

Mainpernors differ from bail, in that a man's bail may take and surrender him up to prison before the stipulated day of appearance, mainpernors can do neither, but are barely *sureties for his appearance* at the day. Bail are only sureties that the party be answerable for the *special matter* for which they stipulate; mainpernors are bound to produce him to answer *all charges whatsoever*. (3 Bl. Com. 128; Bac. Abr. Bail, in Civ. Cases.)

We have little or no *practical occasion* to employ this writ in Virginia, but it subsists with us, and may be used if any one shall think it desirable. (V. C. 1873, c. 15, § 1, 2.)

2^d. The Writ *de Odio et Atia*.

The writ *de odio et atia* issues in England out of *chancery*, and with us would be awarded by any court having power to admit to bail. It is directed to the sheriff, and commands him to inquire whether a prisoner *charged with murder* was committed upon just cause of suspicion or merely *propter odium et atiam*, for hatred and ill-will; and if, upon the inquisition, due cause of suspicion do not appear, then there issues another writ commanding the sheriff to admit him to bail. This writ appears to have been very highly appreciated at an early period of the common law; at that transition-stage of society, when the weapons of violence were beginning to be superseded by the apparatus of the law, and when men were unscrupulous and vindictive in the employment of the last, as they had previously been in the use of the spear and the sword. Bracton mentions it as a writ which ought not to be denied to any man, and by *Magna Charta*, c. 26, it is expressly ordered to be made out *gratis*, without any denial; a precept repeated by statute 13 Edward I, c. 29. It has, however, been long out of use in England; and although, *theoretically*, it subsists in Virginia, yet *in practice* it is unknown. (3 Bl. Com. 128; V. C. 1873, c. 15, § 1, 2.)

The practical necessity or even desirableness of resorting either to a writ of *mainprise* or of *de odio et atia* is with us obviated by the more facile means provided by statute for obtaining bail, namely: by application to a *justice of the peace*, where the charge is not one of felony, or if it be where only a *light suspicion* of guilt falls on the accused; or in any case to the court in which the party is held for trial, or any judge of a circuit, county, or corporation court before conviction. (V. C. 1873, c. 199, § 6, 7.)

3¹. The Writ *de Homine Replegiando*.

The writ *de homine replegiando* lies to replevy a man out of prison, or out of custody of any private person, (in the same manner that chattels taken on distress may, at common law, be replevied), upon giving security to the sheriff that the man shall be forthcoming to answer *any charge* against him. And if the person be conveyed out of the sheriff's jurisdiction the sheriff may return that he is eloigned, (*elongatus*); upon which a process issues (called a *capias in withernam*, Sax. *Wüher*, against, in opposition to, and *name*, a taking), that is, one taking against or in opposition to another, to imprison the *defendant himself*, without bail or mainprise, *till he produces the party*. But this writ is guarded with so many exceptions, (as if the prisoner be in custody by the special warrant of the King or of his chief justiciary, or for homicide, or for breach of the forest-laws, or upon any other charge for which, by law, he is *not repleviable*,) that it is not an effectual remedy in numerous instances of imprisonment, especially where the crown is concerned, and is therefore little used even in England, the general recourse in practice there, as here, in behalf of one alleged to be illegally imprisoned, being to the writ of *habeas corpus*. (3 Bl. Com. 129; Burr. Law Dict. v. *Withernam*; Bosworth's Ang. Sax. Dict. v. *Wither* and *Name*.)

The writ *de homine replegiando* is abolished in Virginia. (V. C. 1873, c. 153, § 13.)

4¹. The writ of *Habeas Corpus*.

The writ of *habeas corpus*, as its name imports, has for its general object the procuring of the body of the person indicated in it to be brought into court, and that for various purposes, so that there are various kinds of the writ employed in the administration of justice, namely, (3 Bl. Com. 129 & seq):

(1), *Habeas corpus ad respondendum*.

This is employed where one has a cause of action against a person who is confined by the process of some inferior court, in order to remove the prisoner and charge him with this new action in the court above.

(2), *Habeas corpus ad satisfaciendum*.

Which is resorted to when a prisoner has had judgment against him in an action, and the plaintiff is desirous to bring him up to some superior court, to charge him *with process of execution*.

(3), *Habeas corpus ad prosequendum, testificandum, deliberandum, &c.*

Which issues when it is necessary to remove a prisoner, in order to prosecute, or to bear testimony in any court, or to be tried in the proper jurisdiction wherein the fact was committed.

(4), *Habeas corpus ad faciendum et recipiendum*.

Which issues out of any of the superior courts when a person is sued in some inferior jurisdiction, and is desirous to remove the *action* into the superior court, commanding the inferior judge to produce the body of the defendant, together with the day and cause of his caption, and detainer, (whence the writ is frequently denominated a *habeas corpus cum causa*), to *do and receive* whatsoever the superior court shall consider in that behalf. This is a writ grantable of common right, without any motion in court, and it instantly supersedes all proceedings in the court below. Various statutes have been, from time to time, enacted to prevent the abuses to which this writ was liable, as 1 & 2 Ph. & M. c. 13, requiring the signature of the judge of the superior court to the writ; 21 Jac. I, c. 23, forbidding the removal in general, after issue or demurrer joined after being once remanded to the inferior court, or at all, where the amount is less than five pounds; and (after several intervening statutes), 7 & 8 Geo. IV, c. 71, which forbids the removal where *the amount is less than fifty pounds*.

All these several kinds of writ of *habeas corpus* exist in Virginia, *theoretically*, as they exist at common law, independently of the English statutes above cited, but there is at present very little occasion in practice to resort to any of them, except that the writ of *habeas corpus ad testificandum* "may be granted by any circuit, corporation, or county court, or any judge thereof in vacation, in the same manner and under the same conditions and provisions as are prescribed by this chapter, as to granting the writ of *habeas corpus ad subjiciendum*, so far as the same are applicable," (V. C. 1873, c. 153, § 14), of which conditions and provisions something will presently be said. See 2 Tuck. Coin. 67-'8.)

But the great and efficacious writ, in all manner of illegal confinement, is that of *habeas corpus ad subjiciendum*, which is the most celebrated writ in the law.

(5), *Habeas corpus ad subjiciendum, faciendum et recipiendum*.

This great and important writ, which is aptly denominated the *citizen's writ of right*, is the means

whereby any imprisonment, or restraint of liberty, alleged to be illegal, may be formally inquired into, and if found to be illegal, the party may be finally discharged. The person having in his custody the party in whose behalf the complaint is made, is required by the terms of the writ, *forthwith* to have the body of such party before the court or judge to do, submit to, and receive whatever shall in that behalf be adjudged. The writ is not designed to test anything but the *sufficiency of the authority* under which the prisoner is held. It is assumed that if there is a legal warrant for his commitment and custody, he will, in due course of law, be discharged. Any inquiry, therefore, into his guilt or innocence, would, for the most part, be irrelevant. (3 Bl. Com. 131 & seq; 1 Rob. Pr. (1st ed.), 651-'2.) The most important benefits of this writ are in connexion with illegal imprisonment, by virtue of some department of public power; but it also extends its influence, as we have seen, to remove every unjust restraint of personal freedom in private life, though imposed by a husband or a father, and on what pretext soever. But when women or infants are brought before the court by a *habeas corpus*, the court will only set them free from an illegal or unreasonable confinement, and will not determine the validity of a marriage, or the right to the guardianship, but will leave them at liberty to choose where they will go; and if there be any reason to apprehend that they will be seized in returning from court, they will be sent home under the protection of an officer. But if a child is too young to have any discretion of its own, then the court will deliver it into the custody of its parent, or the person who appears to be its legal guardian. (King v. Deleval, 3 Burr. 1434; King v. Greenhill, 4 Ad. & El. (31 E. C. L.) 624; Armstrong v. Stone & ux, 9 Grat. 106-'7; 1 Insts. Com. & Stat. Law, 439, 401.)

In further considering the subject let us advert to, (1), The history of the writ of *habeas corpus*; (2), The guaranties and securities afforded for the continued enjoyment of the writ; and (3), The proceedings in prosecuting the writ.

1^k. The History of the Writ of *Habeas Corpus*.

The history of the writ of *habeas corpus* may be exhibited in connexion with three stages of its development, namely, (1), At common law; (2), After the statute 16 Car. I, c. 10; and (3), After the great *habeas corpus act*, 31 Car. II, c. 2;

W. C.

1¹. History of the Writ of *Habeas Corpus* at Common Law.

The personal liberty of the citizen has always been claimed by the English people as a natural inherent right, which cannot be surrendered or forfeited, unless by the commission of some great and atrocious crime, and which ought not to be abridged in any case without the special sanction of law. This doctrine, coeval with the first rudiments of the constitution of England, was handed down from our Saxon ancestors, who maintained it through all their struggles with the Danes, and notwithstanding the violence of the Norman conquest. It was asserted afterwards, and confirmed by the conqueror himself and his descendants; and though sometimes a little impaired by the ferocity of the times, and the occasional despotism of jealous or usurping princes, was yet established on the most certain and unequivocal basis by the provisions of *magna charta*, and a long succession of statutes enacted under Edward III.

To assert an absolute exemption from imprisonment in all cases is inconsistent with every idea of law and political society, and in the end would destroy all civil liberty, by rendering its protection impossible; but the wise policy of Anglican law, whether in England or on other continents where it is naturalized, consists in clearly defining the times, the causes and the extent, where, wherefore, and to what degree the imprisonment of the subject may be lawful. This it is which induces the absolute necessity of expressing *upon every commitment* the reason for which it is made: that the court upon a *habeas corpus* may examine into its validity, and according to the circumstances of the case may discharge, admit to bail, or remand the prisoner; for the king in England, as the representative of the commonwealth, may demand, and must have in the courts of justice, and not merely in the council chamber, an account of the cause wherefore any citizen is deprived of his liberty. (3 Bl. Com. 133; Hale's Hist. Com. Law, 268.)

And yet in 3 Car. I, (A. D. 1627,) the court of king's bench, relying on some arbitrary precedents (and those perhaps misunderstood), determined that they could not upon an *habeas corpus*, either bail or deliver a prisoner, though committed

without any cause assigned, in case he was committed by the *special command of the king*, or by the lords of the privy council. This was in the historical case of Sir Thomas Darnel, Sir John Corbet, Sir Edmund Hampden and others, which is reported at large, with all the attendant circumstances, the arguments of counsel, and the judgment of the court, in 3 Howell's State Trials, 1. The decision itself might justly have alarmed the people of England; but it was preceded by a course of conduct on the part of the king which absolutely thrilled the nation with apprehension. This was the inauguration of that system of assaults on the established constitution which twenty-two years afterwards brought Charles to the scaffold, and at a later period cost his son, James II, his crown. The measure now attempted was that of *forced loans*, which were demanded of all the men of substance in the kingdom, in sums corresponding to their *estimated* wealth. The attempt excited much discontent, and many peremptorily refused to pay the sums assessed upon them. The recusants of rank in all the counties were bound over in recognizances to appear at the *council-board* and answer for this refusal, and such as would not enter into these recognizances were committed to prison. Amongst the many gentlemen who were thus incarcerated throughout England, only five were courageous enough to challenge the government of the king to try the issue which it had provoked, by suing out their writ of *habeas corpus*; and as it was one of the first constitutional battles, fought not on "the fair field of fighting men," but in the *forum*, battles which have done so much to establish the principles and doctrines of rational liberty regulated by law in the hearts and minds of the English-speaking people all the world over, the names of the brave champions who did not "fear the wrath of the king" are not unworthy to be remembered. They were, Sir Thomas Darnel, Sir John Corbet, Sir Wallace Earl, Sir John Heveningham, and Sir Edmund Hampden.

Upon the return made by the keepers of the several jails where these gentlemen were imprisoned, it appeared that they were detained in prison by virtue of warrants from members of the king's privy council, requiring that the custody be continued, and stating that each of them "was and is committed by the *special command of his majesty*," but assigning no

cause of commitment. The complainants claimed that neither the privy council, nor the king himself, could legally commit a subject to prison without setting forth the grounds of it, so that the judges might determine whether it was warranted by the law or not; but the court of king's bench, at the head of which Sir Nicholas Hyde (the uncle of Lord Clarendon,) had been placed *for the occasion*, in place of Sir Randolph Crew, who was supposed not to be prepared to go the necessary lengths in support of the king's action, after long and professedly solemn argument, held that, if a man be committed *by the commandment of the king*, he is not to be delivered by a *habeas corpus* in this court, for we know not the *cause of the commitment*. (See 1 Hal. Const. Hist'y of Eng. c. vii, p. 284.) The prisoners, therefore, were remanded, and remained in confinement about two months, until 29th January, 1628, when the king in council ordered them all to be released. About this time, the king found some *regular* pecuniary supply so indispensable that he was constrained to summon a parliament; and it was probably in anticipation of this necessity that this seeming act of grace was accorded. To that parliament many of the gentleman who had been imprisoned about the forced loan were elected. On the 11th March, 1628, the House of Commons assembled in parliament, with an array of ability, experience, legal and constitutional learning, and patriotic integrity seldom rivalled in any legislative body, and all those high qualities stimulated and nerved by the sufferings which many of the members had personally undergone, and that very recently.

A discussion ensued marked by great decency of tone, and many expressions of profound respect for the king, but marked also by an inflexible purpose that an *actual redress* of grievances, not a mere *promise* of redress, should precede the grant of any supply whatever; and at length, after many conferences between the two houses, and most exhaustive arguments, especially by Mr. Selden and Sir Edward Coke (who, about six years before, had been dismissed by James I from the post of chief justice of England, for opposing the enlargement of the royal prerogative) that famous statute, the *petition of right*, was, on the 26th of May, 1628 agreed to, and on the 28th was presented to the king, who, on the 2d of June came to the parliament in person, and after

an address of a few words to both houses, gave through the lord keeper of the great seal, an assent to the *petition* (which, though conceived in the terms of a petition, was to all intents and purposes a *statute*), but in language so equivocal and unusual as to excite the utmost surprise, and a distrust too strong to be overcome. To the king's demand for a supply of money, and for confidence in the royal word, the commons opposed lamentations over their decayed liberties, mingled with expressions of the most loyal attachment to the king, until at length Charles, finding no other way to obtain means to carry on the government, on the 7th June came again to the House of Lords, and the House of Commons being sent for, he made them a short speech, professing surprise that his former answer had been unsatisfactory, and desiring the *petition* to be read, returned his answer in the accustomed *formula* for the royal assent to legislative acts:

*"Soit droit fait come il est desiré par le petition.
C. R."*

And thus, to the great joy of the commons, ended this first act in what was destined to be in the end a very bloody drama.

All these incidents, and the debates on the subject, may be seen in 3 How. State Tri. 59 to 230; and the petition of right itself, Id. 221 to 224. It may be seen also in 3 Hume's Eng. Note, [D. 8], p. 692; and the substance of it, 1 Insts. Com. & Stat. Law, 61.

Although the *petition of right* resited the illegal judgment in the case of Darnel and others above stated, and emphatically enacted that no freeman thereafter should in any such manner be imprisoned or detained; yet the very next year Mr. Selden and others, having been committed by the lords of the council in pursuance of his majesty's special command, under a general charge of "notable contempts and stirring up sedition against the king and government," the judges delayed for more than seven months to deliver an opinion how far such a charge was bailable. And when at length they agreed that it was, they yet annexed a condition that the prisoners should find sureties for their good behavior, which still protracted their imprisonment, the chief-justice, Sir Nicholas Hyde, at the same time declaring that, if they refused to find sureties, so that the court should remand them, perhaps the

court would not afterwards grant a *habeas corpus*, inasmuch as the judges were made acquainted with the cause of their imprisonment. But this was heard with indignation and astonishment by every lawyer present, according to Mr. Selden's account of the matter, whose resentment was not cooled at the distance of four and twenty years. (3 Bl. Com. 134; 8 How. St. Tri. 281.)

These pitiful evasions, as Blackstone very properly styles them, gave rise to the statute 16 Car. I, c. 10, with which it is proposed to commence the second period in the history of this great writ.

2¹. History of the Writ of *Habeas Corpus*, after the Statute 16 Car. I, c. 10.

The statute 16 Car. I, c. 10, enacts that, if any person be committed by the king himself in person, or by his privy council, or by any of the members thereof, he shall have granted unto him, without any delay upon any pretence whatsoever, a writ of *habeas corpus* of the king's bench, or common pleas, who shall thereupon, within three court-days after the return is made, examine and determine the legality of such commitment, and do what to justice shall appertain in delivering, bailing, or remanding such prisoner. Yet still, in the case of Jenkes, (see 3 Bl. Com. 135), who, in 1676, was committed by the king in council for a *turbulent* speech at Guildhall, (the *turbulence* consisting in his having proposed at a "common hall," an authorized and regular assemblage of the citizens of London, to send a deputation to the Lord Mayor, to desire him to "call a common council," in order to make an address to the king in the name of the city, to call a new parliament), new shifts and devices were made use of to prevent his enlargement by law. The chief-justice (Rainsford), a man of no note, and the chancellor, (who, alas, was no less a person than *Heneage Finch*, Lord Nottingham, the father of modern equity), declined to award a writ of *habeas corpus ad subjiciendum, in vacation*, whereby Jenkes was detained in prison during the greater part of the summer of 1676, to the great injury of his health and business. (3 Bl. Com. 135; 6 Howell's State Trials, 1190 to 1207.)

The speech of Mr Jenkes at the "common hall" which occasioned such offence, is given 6 How. St. Tri. 1189, and demonstrates him to have been a man of sense and reflection; a conclusion confirmed

by his moderate and deferential behavior before the privy council, (Id. 1192). Indeed, it may be observed throughout those troublous times, what vigor and effect were imparted to constitutional efforts to resist tyranny sought to be enforced by law, by *unruffled calmness of demeanor*, the observance of the forms of respect and forbearance, and abstinence from denunciation.

A deplorable spirit of subserviency in the judges (owing to their office being held at the pleasure of the crown), had allowed other abuses to creep into the daily practice touching the writ of *habeas corpus*, which had in a measure defeated, or at least impaired the benefit of this great constitutional remedy. Thus, amongst others, it was held that the party imprisoning might delay his obedience to the first writ, and might wait till a second and a third, called an *alias* and a *pluries*, were issued, before he produced the complainant; and many other vexatious shifts were practised to detain State prisoners in custody. But, as Blackstone observes, the attentive consideration of English history shows that the flagrant abuse of any power by the crown or its ministers has always been productive of a struggle, which either discovers the exercise of that power to be contrary to law, or (if legal) restrains it for the future. So it was in the present instance. The grievous oppression of Jenkes, a comparatively obscure individual, demonstrated the imperfection of the statute of 16 Car. I, c. 10, and gave birth to the famous *habeas corpus* Act, 31 Car. II, c. 2, (A. D. 1680,) which is frequently considered as another *Magna Charta*.

3¹. History of the Writ of *Habeas Corpus* after the Stat. 31 Car. II, c. 2.

The Stat. 31 Car. II, c. 2, is drawn with elaborate care, with a view to prevent, not only evasions which had been previously practised, but to anticipate and forbid, as far as human foresight could go, all that might possibly be resorted to in the future; and as it has accomplished its purpose with singular success, it is, as it deserves to be, the prototype of all the American statutes upon the subject. It will not be amiss, therefore, to submit Blackstone's abstract of its provisions, as exhibiting also the substance of the general legislation upon the subject in the United States, although the student must expect to find diversities in the details, not only as com-

pared with the English Act, but also as between the several States, and in respect to the Federal government.

The statute enacts—

(1), That on complaint and request in writing, by or on behalf of any person committed and charged with *any crime* (unless committed for treason or felony expressed in the warrant, or as accessory, or on suspicion of being accessory before the fact, to any petit treason or felony, or upon suspicion of such petit treason or felony, plainly expressed in the warrant, or unless he is convicted or charged in execution by legal process), the *lord chancellor*, or any of the twelve (now eighteen) judges, *in vacation*, upon viewing a copy of the warrant, or affidavit that a copy is denied, shall (unless the party has neglected for two terms to apply to any court for his enlargement) award a writ of *habeas corpus* for such prisoner, *returnable immediately*, before himself or any other of the judges, and upon the return made shall discharge the party, *if bailable*, upon giving security to appear and answer to the accusation in the proper court of judicature;

(2), That such writs shall be indorsed, as granted in pursuance of this act, and signed by the person awarding them;

(3), That the writ shall be returned, and the prisoner brought up, within a limited time according to the distance, not exceeding in any case twenty days;

(4), That officers and keepers neglecting to make due returns, or not delivering to the prisoner or his agent within six hours after demand, a copy of the warrant of commitment, or shifting the custody of a prisoner from one to another, without sufficient reason or authority (specified in the act), shall for the first offence forfeit £100, and for the second offence £200, to the party aggrieved, and be disabled to hold his office;

(5), That no person once delivered by *habeas corpus* shall be *recommitted for the same offence*, on penalty of £500;

(6), That every person committed for treason or felony shall, if he requires it, the first week of the next term, or the first day of the next session of *oyer and terminer*, be indicted in that term or session, or else admitted to bail. unless the king's witnesses cannot be produced at that time; and if ac-

quitted, or if not indicted and tried in the second term or session, he shall be discharged from his imprisonment for such imputed offence; but no person, after the assizes shall be open for the county in which he is detained, shall be removed by *habeas corpus*, till after the assizes are ended; but shall be left to the justice of the judges of assize:

(7), That any such prisoner may move for, and have, his *habeas corpus* as well out of the chancery or exchequer, as out of the king's bench or common pleas; and the lord chancellor or judges denying the same on sight of the warrant, or oath that the same is refused, forfeit severally, to the party grieved the sum of £500:

(8), That this writ of *habeas corpus* shall run into the counties palatine, *cinque ports*, and other privileged places, and the islands of Jersey and Guernsey:

(9), That no inhabitant of England (except persons contracting, or convicts praying to be transported, or having committed some capital offence in the place to which they are sent), shall be sent prisoner to Scotland, Ireland, Jersey, Guernsey, or any places beyond the seas, within or without the king's dominions, on pain that the party committing, his advisers, aiders, and assistants, shall forfeit to the party aggrieved a sum not less than £500, to be recovered with treble costs, shall be disabled to bear any office of trust or profit; shall incur the penalties of *præmunire*, and shall be incapable of the king's pardon; (3 Bl. Com. 136-'7; Bac. Abr. Hab's Corp's (B).)

"This," says Blackstone, "is the substance of that great and important statute, which extends (we may observe) only to the case of commitments for such *criminal charge* as can produce no inconvenience to public justice by a temporary enlargement of the prisoner; all other cases of unjust imprisonment being left to the *habeas corpus* at common law. But even upon writs at the common law, it is now expected by the court, agreeable to ancient precedents and the *spirit* of the act of parliament, that the writ should be *immediately obeyed*, without waiting for any *alias* or *pluries*; otherwise an attachment will issue. By which admirable regulations, judicial as well as parliamentary, the remedy is *now complete* for removing the injury of unjust and illegal confinement,—a remedy the more necessary, because the oppression does not always arise from

the ill-nature, but sometimes from the mere inattention of government. For it frequently happens in foreign countries (and has happened in England during temporary suspensions of the statute) that persons apprehended upon suspicion, have suffered a long imprisonment, merely because *they were forgotten*." (3 Bl. Com. 137-'8.)

This extract has been given entire, although in it the great commentator, *more suo*, has carried his panegyric upon the law as it existed in his time somewhat farther than the facts warranted. Several years before his lectures were published, but also several years after they were first delivered, there took place upon this topic a remarkable discussion by all the judges of England, at the instance of the House of Lords, upon the occasion following. A gentleman, in the year 1757, having been *impressed* into the military service, an application was made by his friends for a writ of *habeas corpus*, which produced some hesitation and difficulty; for, according to the statute, the privilege of the writ relates only to persons committed for imputed crimes; and this gentleman did not stand in that predicament.

Before the question could be determined, the party was discharged by order of the Secretary of War; but the case suggesting a defect in the *habeas corpus* act, a bill was introduced into the House of Commons, amending it so as to make it applicable to *every case of illegal confinement*, on whatsoever pretext. The bill was soon passed by the Commons, but was thrown out by the Lords upon the second reading; and whilst under consideration by the Lords, certain questions were propounded by that house to the judges, which the judges answered *seriatim*, disclosing a material diversity of opinion among them upon several points not provided for by the statute of 31 Car. II. The judges were then directed to propose a bill in place of that rejected by the Lords, which they did accordingly, but it was not acted upon; nor did either house take any further notice of the subject until 1816, when the substance of the bill prepared by the judges in 1758 was enacted into a law. (Stat. 56 Geo. II, c. 100; see Bac. Abr. Hab's Corp's (B), 13, p. 592, & seq.)

The practice touching writs of *habeas corpus* belongs to a subsequent head, but reference in connexion therewith may here be made to Bac. Abr. Habeas Corpus, (B.)

- 2^d. The *Guaranties and Securities* afforded for the Continued enjoyment of the benefit of the Writ of *Habeas Corpus ad subjiciendum*, &c.

The guaranties and securities afforded in England are *merely statutory*. As they are originated by parliament, so parliament may abrogate them, and may abolish the writ itself, nothing being interposed to prevent but the sense and spirit of the people of England, who would probably deem such action of their legislature, (unless it were for a temporary occasion, and under the presence of very urgent and palpable public danger), a cause of revolution.

The guaranties and securities in the United States are somewhat better, being professedly organic and constitutional, enacted by the *body of the people*, in the exercise of their sovereignty, and not susceptible of being evaded or modified by the legislature; that is, *not legally*. But power is unscrupulous, and the people of these States may be assured that *constitutional barriers* are feeble restraints unless there are behind them a popular intelligence to perceive, and a popular virtue and courage to rebuke, and watchfully and wisely to oppose usurpation in its beginnings.

We live under two governments, occupying, for the most part, distinct spheres of action, but both operating *upon individuals*, and therefore requiring each to be restrained from the arbitrary invasion of the rights of the subject. Let us consider, therefore, the guaranties and securities for the continued enjoyment of the writ of *habeas corpus*: (1), As provided by the *constitution of Virginia*, as against the government of Virginia; and (2), As provided by the *constitution of the United States*, as against the government of the United States.

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- 1st. Guaranties and Securities for the Writ of *Habeas Corpus*, as provided by the *Constitution of Virginia*.

These guaranties, &c., relate only to the action of the *government of Virginia*, and impose no restraint upon the Federal authorities, in respect to the people of this Commonwealth. Besides the guaranties afforded by the popular representation in the legislature, and the danger of public discontent, we have in our State constitution a provision that "The privilege of the writ of *habeas corpus* shall not be suspended, unless when, in cases of invasion

or rebellion, the public safety may require it." (Va. Const. 69, Art. V, § 14.)

There is a prevailing sentiment connected with the suspension of the writ of *habeas corpus*, that it places the citizen entirely at the mercy of those in authority. So it does, so far as the prompt inquiry into the *lawfulness* of any imprisonment is concerned, and the immediate release of the prisoner. But the suspension of the writ goes no farther. It does not legalize what would otherwise be wrongs, nor afford an answer to an *action for false imprisonment*. The functionaries of government are apt to imagine that, during the period of suspension, the citizen is stript entirely of the protection of the law, a dream from which they are sometimes awakened to find that they have incurred formidable civil responsibility in damages to the parties whom they have oppressed.

See *Milligan's Case*, 4 Wal. 121 & seq; 6 Rob. Pr. 628 & seq.

2^d. Guaranties and Securities for the Writ of *Habeas Corpus*, as provided by the *Constitution of the United States*.

The guaranties and securities are the same as those provided in reference to the Commonwealth of Virginia; relating, however, only to the action of the *Federal authorities*. The constitutional provision (U. S. Const. Art. I, § ix. 2,) is word for word the same, and similar observations are applicable in respect to the effect of suspending the writ of *habeas corpus*.

3^d. The Proceedings in Prosecuting the Writ of *Habeas Corpus* in Virginia Courts.

The statute provides, that the writ of *habeas corpus ad subjiciendum* shall be granted *forthwith*, by any circuit, corporation, or county court, or any judge of either in vacation, to any person who shall apply for the same on petition, showing by *affidavits* or other evidence, probable cause to believe that he is detained *without lawful authority*. (V. C. 1873, c. 153, § 1.)

This provision, it will be observed, embraces not only imprisonments upon a *criminal charge*, but any confinement *without lawful authority*. Hence, it was formerly employed to liberate colored persons unlawfully deprived of liberty by parties *not claiming them as slaves*; for if claimed *as slaves* they asserted their freedom by a proceeding *in forma pauperis*, in a manner prescribed, and *not otherwise*. (De Lacy

v. Antoine & als, 7 Leigh, 438, 443; Ruddle's Ex'or v. Ben, 10 Leigh, 467; Shue v. Turk, 15 Grat. 260.) It is also employed by a parent or guardian to recover a *young child*—too young to exercise any election as to the person with whom it will be, (Armstrong v. Stone & ux, 9 Grat. 103;) and in order to discharge one in custody under a conviction of a penal offence, by a court of *oyer and terminer*, to which there is no writ of error, where the conviction *on its face* is illegal, (Ball's Case, 2 Grat. 588; Elvira's Case, 16 Grat. 561; Yerger's Case, 8 Wal. 85; Lange's Case, 17 Wal. 163; Park's Case, 3 Otto, 18;) and in order to bring before the court of appeals, with a view to be discharged, a prisoner in the penitentiary, when that court reverses the judgment of the court below. (Leftwich's Case, 20 Grat. 716, 722; Jone's Case, Id. 848.)

It appears, moreover, that the affidavit of the applicant is sufficient to institute the proceedings, notwithstanding such applicant may be a disqualified witness, as by reason of conviction of an infamous offence, &c., just as the affidavit of such a person is sufficient on an application for an injunction, a continuance, &c., (De Lacy v. Antoine & als, 7 Leigh, 449); and that the proceeding is not to be delayed so as to protract the imprisonment of the party, except for short periods, with the definite and reasonable expectation of procuring evidence to prove the confinement legal. (De Lacy v. Antoine & als, 7 Leigh, 448-'9.)

It is further to be observed, that if the prisoner is held under the authority, or under claim and color of authority of the United States by an officer thereof, the State courts have no power to issue a writ of *habeas corpus* for his discharge, for the exercise of such a power would be incompatible with the independent action of the Federal government, and would expose its authority to be thwarted by the States. (Ableman v. Booth, 21 How. 506, which was a case arising under the fugitive-slave law of 1850, and Tarble's Case, 13 Wal. 397, 405 & seq, which was the case of a recruit enlisted into the United States army.) And although in Virginia, and in many other States, not a few cases are to be found where the writ of *habeas corpus* was issued, and the party discharged in contravention of this doctrine, (*e. g.*, *ex-parte* Pool & al, 2 Va. Cas. 276; U. S. v. Cottingham, 1 Rob. 615; U. S. v. Blakeney,

3 Grat. 405; U. S. v. Lipscomb, 4 Grat. 41,—the three last being cases of enlisted recruits in the United States army, and the first of sailors deserting their vessel); yet those cases arose before the supreme court of the United States had considered and adjudicated the question, and they were determined without argument on that point, which was not adverted to by either counsel or judges.

The writ is to be directed *to the person in whose custody* the petitioner is detained, and is to be made *returnable as soon as may be*, before the court or judge ordering the same, or any other of the said courts or judges. (V. C. 1873, c. 153, § 2.)

The court or judge granting the writ may previously require bond with surety, in a reasonable penalty, payable to the person to whom the writ is directed, with condition that the petitioner *will not escape by the way*, and for the payment of such costs and charges as may be awarded against him. It is to be filed with the proceedings, and may be sued on for the benefit of any person injured by the breach of its condition. (V. C. 1873, c. 153, § 3.)

The writ is to be served *on the person to whom it is directed*, or in his absence from the place where the petitioner is confined, on the *person having the immediate custody* of him. And if any person on whom such writ is served shall, in disobedience thereto, *fail to bring the body of the petitioner*, with a return of the cause of his detention, before a court or judge before whom the writ is returnable, *for three days* after such service, or when he has to bring the prisoner more than twenty miles, for so many more days as is equal to one day for every twenty miles of such further distance, he shall *forfeit to the petitioner* \$300. (V. C. 1873, c. 153, § 4, 5.)

The court or judge before whom the petitioner is brought, after hearing the matter, *both upon the return and on any other evidence*, shall either discharge or remand him, or admit him to bail, as may be proper, and adjudge the costs of the proceedings, including the charge for transporting the prisoner, to be paid as shall seem to be right. And at the discretion of the court or judge, the affidavits of witnesses taken by either party, on reasonable notice to the other, may be read as evidence. (V. C. 1873, c. 153, § 6, 7.)

All the material facts proved, when required by either party, shall be made a part of the proceedings,

which, when they are *had in vacation*, shall be signed by the judge, and certified by the same, to the clerk of the circuit, corporation, or county court of the county or corporation in which the judgment is rendered, and be entered by him among the *records of the court*. (V. C. 1873, c. 153, § 8.)

The judge issuing any such writ in vacation, or the judge before whom it is tried, has the same power to enforce obedience to the writ, to compel the attendance of witnesses, or to punish contempts of his authority, as a court has; and his judgment on the trial of the writ, when entered of record as aforesaid, shall be considered and be enforced as if it were a judgment of the court among whose records it is entered. And any such judgment entered of record shall be conclusive, unless the same be reversed, except that the petitioner shall not be precluded from bringing the same matter in question in an action for false imprisonment. (V. C. 1873, c. 153, § 9, 10.)

If, during the recess of the court of appeals, the governor, or the president of the court should think the immediate revision of any such judgment to be proper, he may summon the court for the purpose, to meet on any day to be fixed by him. (V. C. 1873, c. 153, § 11.)

When the prisoner is remanded, the execution of the judgment shall not be suspended by the writ of error, or suspended for the purpose of applying for one; but when he is ordered to be discharged, and the execution of the judgment is suspended for the purpose of applying for a writ of error, the court or judge making such a suspending order, may, in their discretion, admit the prisoner to bail until the expiration of the time allowed for applying for the writ of error, or in case the writ of error be allowed, until the decision of the court of appeals thereon is duly certified. (V. C. 1873, c. 153, § 12.)

4*. The Proceedings in Prosecuting the Writ of *Habeas Corpus* in the *United States Courts*.

The proceedings in prosecuting the writ of *habeas corpus* in the *United States courts*, may be referred to the heads following, namely: (1), The courts and judges which may grant the writ; (2), The cases in which it may be granted; and (3), The mode of conducting the proceedings;

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- 1¹. The *United States Courts and Judges* which may award the Writ of *Habeas Corpus*.

The district and circuit courts of the United States have power to award the writ *in all cases* where it is proper to award it at all, and the supreme court, where it is necessary in the *exercise of its appellate functions*; that is, where a prisoner is held under the judgment of an inferior Federal court, to enquire whether such judgment is or is not *without authority of law*. (Bright. Dig. 301-'2; Rev. Stats. U. S. 141, § 751 & seq; 14 U. S. Stats. 385; 15 Id. 44; 16 Id. 44-'5; Hamilton's Case, 3 Dal. 17; Burford's Case, 3 Cr. 448; *Ex parte* Bollman, 4 Cr. 75; *Ex parte* Watkins, 3 Pet. 193; S. C. 7 Id. 568; *Ex parte* Metzger, 5 How. 176; *Ex parte* Kaine, 14 How. 103; *Ex parte* Wells, 18 How. 307; *Ex parte* Milligan, 4 Wal. 2; *Ex parte* McCardle, 6 Wal. 318 S. C. 7 Wal. 506; *Ex parte* Yerger, 8 Wal. 85; *Ex parte* Lange, 18 Wal. 166; *Ex parte* Parks, 3 Otto. 18; Desty's Fed. Proced. 121 & seq.)

Any United States judge is also empowered to award the writ, whether a justice of the supreme court, a circuit judge, or a judge of any district court of the United States, within their respective jurisdictions. (1 Bright. Dig. 301-'2; Rev. Stats. U. S. 142, § 752, & seq; 14 U. S. Stat. 385; 16 Id. 44-'5; Desty's Fed. Proced. 121-'2.)

The power of the *supreme court* is limited to cases of *appellate* jurisdiction, not by the judiciary act of 1789, (§ 14,) nor by any other act of Congress, for the judiciary act bestowed the same power upon the supreme court as upon the circuit and district courts, but the limitation is occasioned by the *federal constitution*, (Art. III, § ii, 2); which declares that "In all cases *affecting ambassadors*, other public ministers, and consuls, and those in which *a state shall be a party*, the supreme court shall have *original jurisdiction*. In all other cases before mentioned, (that is, cases cognizable by the Federal judiciary), the supreme court shall have *appellate jurisdiction*;" in pursuance of which it has been held from an early period, that it was not competent to Congress to confer upon the supreme court *original* jurisdiction, save only in the two instances above stated; and therefore, that in other instances the award of writs of *mandamus*, *habeas corpus*, &c., must be limited to cases of appellate cognizance in that court. (Marbury v. Madison, 1 Cr. 137; Bollman and Swartwout's Case, 4 Cr. 100; *Ex parte* Yerger, 8 Wal. 97-'8.)

This was the state of the law when, in 1867, a more comprehensive statute was enacted, conferring upon the courts and judges of the United States, "*in addition to the authority already conferred by law,*" power to grant writs of *habeas corpus* in all cases "where any person may be restrained of his or her liberty *in violation of the constitution, or of any treaty or law of the United States;*" and from the final decision of a district judge or court, allowing an *appeal* to the circuit court of the United States, and from the judgment of the circuit court to the *United States Supreme Court*. (Act. Cong. Feb. 5, 1867, 14 U. S. Stats. 385-6, § 1; Rev. Stats. U. S. 143, § 763, & seq.) In this act, not only are there no words repealing the previous legislation touching the writ of *habeas corpus* in the judiciary act of 1789, and in the acts amendatory thereof in 1833 and 1842, but there is a pretty distinct recognition of such previous legislation in the clause of the act of 1867, which declares the powers conferred by it to be "*in addition to the authority already conferred by law;*" so that, if there be any repeal, it must be *by implication*. But repeals by implication are not favored. They are seldom admitted except on the ground of repugnancy; and never when the former act *can stand together with the new*. (*Ex-parte Yerger*, 8 Wal. 105; Dwarr. Stats. (Potter's Ed.), 154-5, & n 4.)

But by act of 27th March, 1868, it was enacted that "*so much of the act approved Feb. 5th, 1867, entitled, &c., as authorizes an appeal from the judgment of the circuit court to the supreme court of the United States or the exercise of any such jurisdiction by said supreme court on appeals which have been or may hereafter be taken, be, and the same is, hereby repealed.*" (15 U. S. Statutes, 44.)

The occasion and effect of this last act is thus stated by Chase, C. J. in pronouncing the opinion of the court in *ex-parte Yerger*, 8 Wal. 104-5. One McCardle alleging unlawful restraint by military force, petitioned the circuit court for the southern district of Mississippi for the writ of *habeas corpus*. The writ was issued and a return was made; and upon hearing, the court decided that the restraint *was lawful*, and remanded him to custody. McCardle prayed an appeal to the supreme court of the United States, which was allowed and perfected. "The case was then argued at the bar, and

the argument having been concluded on the 9th of March, 1868, was taken under advisement by the court. While the cause was thus held, and before the court had time to consider the decision proper to be made, the repealing act under consideration (of 27th March, 1868,) was introduced into Congress. It was carried through both houses, sent to the President, returned with his objections, repassed by the constitutional authority in each house, and became a law on the 27th of March, within eighteen days after the conclusion of the argument.

"The effect of the act was to oust the court of its jurisdiction of the *particular case* then before it on appeal, and it is not to be doubted that *such was the effect intended*. Nor will it be questioned that legislation of this character is *unusual and hardly to be justified*, except upon some imperious public necessity.

"It was, doubtless, within the constitutional discretion of Congress to determine whether such an exigency existed, but it is not to be presumed that an act passed under such circumstances was intended to have any further effect than that *plainly apparent* from its terms.

"It is quite clear that the words of the act reach, not only *all appeals pending*, but all *future appeals* to this court *under the act of 1867*; but they appear to be limited to *appeals taken under that act*.

"The words of the repealing section * * * are not of doubtful interpretation. They repeal only *so much of the act of 1867* as authorized *appeals*, or the exercise of *appellate jurisdiction* by this court. They affected only appeals and appellate jurisdiction *authorized by that act*. They do not purport to touch the appellate jurisdiction conferred by the constitution, or to except from it any cases not excepted by the act of 1789. They *reach no act except the act of 1867*.

"Our conclusion is, that none of the acts prior to 1867, authorizing this court to exercise appellate jurisdiction by means of the writ of *habeas corpus*, were repealed by the act of that year, and that the repealing section of the act of 1868, is limited *in terms*, and must be limited *in effect*, to the appellate jurisdiction authorized by the act of 1867."

This conclusion had been foreshadowed at the first hearing of *McCardle's case* prior to the act of 1868, (16 Wal. 324-'5), and was distinctly intimated in the final judgment in the same case, delivered by

the chief-justice, in dismissing McCordle's appeal, (7 Wal. 515), and has since been confirmed by the supreme court in *Ex-parte Lange*, 18 Wal. 166.

The result is that at present, (as prior to 1867), the supreme court of the United States has power, by means of a writ of *habeas corpus*, accompanied by a writ of *certiorari*, under the constitution of the United States and the fourteenth section of the judiciary act of 1789, to bring up a prisoner, and the proceedings in the circuit court under which the petitioner is restrained of his liberty, and to examine those proceedings so far as may be necessary to ascertain whether that court has exceeded *its authority*, and pronounced a judgment not only erroneous, but *actually void*. (*Ex-parte McCordle*, 6 Wal. 324-'5; *Ex-parte Yerger*, 8 Wal. 85, 103, 106; *Ex-parte Lange*, 18 Wal. 165-6; *Ex-parte Parks*, 3 Otto. 18.)

2¹. The Cases in which a Writ of *Habeas Corpus* may be awarded by the United States Courts and Judges.

The great and leading intent of the constitution and laws of the United States in respect to the writ of *habeas corpus* is manifest. It is that every citizen may be protected by judicial action, from unlawful imprisonment, under the authority, or under the pretext of the authority of the United States. To this end the act of 1789 (1 U. S. Stats. 81, § 14), provides that every court and judge of the United States shall have power to award the writ. The jurisdiction thus given to the circuit and district courts is *original*; that given by the constitution and the law to the supreme court is *appellate*. Given in general terms, it must necessarily extend to all cases to which the judicial power of the United States extends, other than those *expressly excepted* from it.

As limited by the act of 1789, it did not extend to cases of imprisonment *after conviction*, under sentence of competent tribunals; nor to prisoners in jail, unless in custody *under or by color of the authority of the United States*, or committed for *trial before some court of the United States*, or required to be *brought into court to testify*. But this limitation has been gradually *narrowed*, and the benefits of the writ have been *extended*, first in 1833, (4 U. S. Stats. 634; 1 Bright. Dig. 302), to prisoners confined under *any authority*, whether State or national, for any act done or omitted *in pursuance of a law of the United States*; then in 1842 (5 U. S. Stats. 539; 1

Bright. Dig. 302), to prisoners, being *subjects or citizens of foreign States*, in custody under national or State authority, for acts done or omitted *by or under color of foreign authority*, and alleged to be *valid under the law of nations*; and finally, in 1857, (14 U. S. Stats. 385), to *all cases*, where any person may be *restrained of liberty, in violation of the constitution, or of any treaty or law of the United States*. (Rev. Stats. U. S. 143, § 763.)

This statement shows how the general spirit and genius of the jurisprudence of the United States has tended to the widening and enlarging of the *habeas corpus* jurisdiction of the courts and judges of the United States; and this tendency, it will be observed, except in the deplorable instance of partizan-ship, in the act of 1868, has been constant and uniform; and it is in the light of this progressive sentiment that the law is to be interpreted in respect to the several cases of illegal imprisonment to which the writ is applicable.

It is difficult to conceive any possible case of imprisonment under the authority, real or pretended, of the *United States*, to which the writ is not applicable, or even if not under the authority of the United States, if *in contravention of the constitution, or of any treaty or law of the United States*. Let us note some of the more conspicuous cases in which it has been actually applied :

The writ has been employed to liberate a prisoner, confined under authority of the United States, in the warrant committing whom, either no cause or an insufficient cause, of commitment was set forth. (Burford's Case, 3 Cr. 448; Bollman & Swartwout's Case, 4 Cr. 100;)

To inquire into the legality of the commitment by a United States commissioner, of a prisoner, under an *extradition treaty* with a foreign power. (Kaine's Case, 14 How. 103; *Ex-parte* Smith, 8 McLean, 121; *Ex-parte* Henrich, 5 Blatchf. 414; Martin's Case, Id. 303;)

To discharge a Federal officer imprisoned under *State process*, if arrested for his conduct in executing process of the United States. (*Ex-parte* Jackson, 2 Wal. Junr. 521; *Ex-parte* Robinson, 6 McLean, 355;)

To discharge one illegally arrested or detained upon civil, as well as *criminal* process, is sued under authority of United States. (*Ex-parte* Randolph,

2 Brock. 447, 476, 487; Kaine's Case, 14 How. 134; *Ex-parte* Watkins, 7 Pet. 568;)

To inquire into the legality of imprisonment of one who claims to have been *pardoned* by the president. (Well's Case, 18 How. 307;)

To discharge one (*a civilian*) illegally imprisoned in pursuance of the sentence, or by authority of a *military commission*. (Milligan's Case, 4 Wal. 2; Yerger's Case, 8 Wal. 100, 103;)

To discharge one against whom a sentence of imprisonment has been pronounced, which is *unconstitutional, void, and without authority on its face*. (Lange's Case, 18 Wal. 163, 176 & seq; Park's Case, 3 Otto. 18.)

But it is agreed, that where the imprisonment is by virtue of the sentence of a court of *competent jurisdiction*, however erroneous and unjust it may be, the writ of *habeas corpus* cannot be awarded; or rather upon its being awarded, and its appearing from the return that the party is in confinement upon the judgment of such a court; that is itself a sufficient cause, and the prisoner must be remanded. (*Ex-parte* Kearney, 7 Wheat. 38; *Ex-parte* Watkins, 8 Pet. 193; Johnson v. U. States, 3 McLean, 89; *Ex-parte* Parks, 8 Otto. 18.) Thus, Kearney having been committed for contempt of court, it was held that he could not be discharged upon *habeas corpus*. (7 Wheat. 38.)

Nor can a *habeas corpus* be awarded to bring up a prisoner confined in pursuance of *State process*, (save only, *ad testificandum*), unless he is held in violation of the constitution, or of some law or treaty of the United States. (*Ex-parte* Dorr, 3 How. 103; U. States v. French, 1 Gall. 1; *Ex-parte* Cabrera, 1 Wash. Cir. C. Rep. 232; 14 U. S. Stats. 385.)

And it may be remarked, as we have seen, that on the other hand, the State courts have no power to award a writ of *habeas corpus* to inquire into the lawfulness of any imprisonment colorably alleged to be under authority of the United States. (Ableman v. Booth, 21 How. 506; Tarble's Case, 13 Wal. 395, 405.)

8'. The Mode of Conducting the Proceedings in United States Courts.

The authority to issue the writ of *habeas corpus* depends on the *written law* of the United States, but as it is a process well known to the common law, its meaning and effect, and the practice under it,

were regulated, until 1867, principally by that law. Thus it was acknowledged to be a *writ of right*, but it was not therefore a *writ of course*, issued without the exercise of any discretion, but only upon cause shown; and if upon the statements contained in the application for the writ, the ground relied on by the applicant is seen to be *undoubtedly insufficient*, the application may be denied in the first instance. (*Ex-parte Watkins*, 3 Pet. 201; 1 Abb. U. S. Pract. 481-'2.)

Apart from the act of 1867, the course of proceeding has been for the applicant for the writ to present to the court or judge a statement, verified by affidavit, setting forth the facts on which the application is based, and thereupon the writ has usually been issued, and the case has been heard and disposed of on its return; but, as has just been remarked, where the cause of imprisonment is *fully shown by the petition*, the court, without issuing the writ, may consider and determine whether, upon the facts presented in the petition, the prisoner if brought before the court would be discharged. This course was adopted in *Ex-parte Watkins*, 3 Pet. 201, and in *Yerger's Case*, 8 Wal. 105; and was sanctioned in *Milligan's Case*, 4 Wal. 110; and by the act of 1867 is expressly allowed.

The act of 1867 (14 U. S. Stats. 385-'6; Rev. Stats. U. S. 141-143, § 751-756;) for the first time prescribes with some minuteness the *mode of proceeding*, which, as it is convenient, and in the main conformable to the usage previously prevailing, will doubtless regulate the practice in future, even in cases which may not be in all respects within the terms of the act. The substance of that statute is as follows:

The *several courts* of the United States, and the *several justices and judges* of such courts within their respective jurisdictions, *in addition to the authority already conferred by law*, shall have power to grant writs of *habeas corpus* in all cases where any person may be restrained of his or her liberty *in violation of the constitution or of any treaty or law of the United States*. (Desty's Fed. Proced. 121-'2.)

Such person may apply to *either of said justices or judges* for a writ of *habeas corpus*, which application shall be *in writing*, signed by the *prisoner*, and verified by *affidavit*, and shall set forth the facts concerning the detention of the applicant in whose cus-

tody he is detained, and by virtue of what claim or authority, if known.

The *court, justice, or judge* to whom the application is made shall forthwith award a writ of *habeas corpus*, unless it shall appear *from the petition itself* that the party is *not deprived of his liberty in contravention of the constitution or laws of the United States*. (Desty's Fed. Proced. 122-'8.)

The writ is to be directed to the person in whose custody the party is detained, who is to *make return* of said writ, and *bring the party before the court or judge* who granted it, with a certificate of the true cause of the detention of the person, *within three days thereafter*, unless the person be detained beyond the distance of twenty miles; and if beyond twenty and not above one hundred miles, then within ten days; and if beyond one hundred miles, then within twenty days.

Upon the return of the writ, a day shall be set for the *hearing of the cause*, not exceeding five days thereafter, unless the party petitioning shall request a longer time.

The petitioner may deny any of the material facts set forth in the return, or may allege any fact to show that the detention is in contravention of the constitution or laws of the United States, which allegations or denials shall be made on oath. The return may be amended by leave of the court or judge before or after the same is filed, as also may all suggestions made against it, that thereby the material facts may be ascertained.

The *court or judge* shall proceed in a summary way to determine the facts of the case by hearing testimony, and the arguments of the parties interested, and if it shall appear that the petitioner is deprived of his liberty *in contravention of the constitution or laws of the United States*, he is forthwith to *be set at liberty*. (Desty's Fed. Proced. 123.)

If any person to whom the writ is directed shall refuse to obey the same, or neglect, or refuse to make return, or make a false return, *in addition to the remedies already given by law*, he shall be deemed guilty of a misdemeanor, and be punished by fine not exceeding one thousand dollars, and imprisonment not over one year, or by either, according to the nature of the case.

From the final decision of any judge, justice, or court inferior to the circuit court, an *appeal* may be

taken *to the circuit court* of the United States for the district in which the cause is heard, * * * on such terms and regulations as well for the custody and appearance of the alleged prisoner, as for sending up to the appellate tribunal a transcript of the petition, writ, return, and other proceedings as may be prescribed by the supreme court, or in default of such, as the judge hearing the case may prescribe.

And pending such proceedings on appeal, and until final judgment be rendered therein, and after final judgment of *discharge* in the same, any proceeding against the alleged prisoner, in *any State court*, or by or under the authority of any State, for any matter so heard and determined, or in process of being heard and determined, under such writ of *habeas corpus*, shall be deemed *null and void*. (Rev. Stats. U. States, p. 141, & seq, § 751 to 766; Dwyer's Fed. Procedure, 121 & seq.)

2^b. Remedies to obtain *Satisfaction in Damages* for the Injury of *False Imprisonment*; W. C.

1^a. Action of Trespass *vi et armis*.

This is, at common law, the proper action, the injury having been accomplished *directly by force*. The recovery of amends is in the form of damages, such as a jury shall estimate will suffice to indemnify the complainant for the injury suffered by him. (3 Bl. Com. 138; 1 Chit. Pl. 192-'3; Sedgw. Damages, 51, 552.)

2^a. Action of Trespass on the Case.

The action of trespass on the case is rarely, if ever, proper at common law to redress the injury of false imprisonment. If it is so in any case, it is where the imprisonment is inflicted *under color of process*. (1 Chit. Pl. 192.) But as we have seen, the statutory doctrine in Virginia is that, "in any case in which an action of trespass will lie, there may be maintained an action of trespass on the case." (V. C. 1873, c. 145, § 6.)

3^a. Wrongs done to *Private Property*, and Remedies therefor.

As the right to private property is an *absolute right*, a due regard to the analytical arrangement requires that it should be here mentioned in its due order; but the topic will be more expediently unfolded and discussed under the head of *injuries done to property*, presently to be entered upon.

4^a. Wrongs done to *Freedom of Conscience*, and Remedies therefor.

Freedom of conscience cannot *tangibly* be violated, save through injuries done *to the person*, or *to the property*, to which heads, therefore, reference may be made for whatsoever belongs to the subject:

2°. Wrongs which affect *Relative Rights*, and *Remedies therefor*; W. C.

1°. Wrongs done to one in the *Relation of Husband*, and *Remedies therefor*.

The wrongs which may be suffered by one in the relation of husband are, (1), The *abduction* or taking away of the wife; (2), *Adultery*, or criminal conversation with her; and (3), *Beating*, or otherwise abusing her; W. C.

1°. Abduction, or Taking away of the Wife, and Remedies therefor.

The abduction or taking away of the wife may be either by fraud and persuasion, or by open violence, though the law in both cases supposes force and constraint, the wife *having no power to consent*. The husband is also entitled to recover damages against such as persuade and entice the wife to live separate from him without sufficient cause. And the old law was so strict on this point, that if one's wife missed her way upon the road, it was not lawful for another man to take her into his house, unless she was benighted and in danger of being lost, or drowned; but a stranger might carry her behind him on horseback to market, to a justice of the peace for a warrant against her husband, or to the spiritual court to sue for a divorce. (3 Bl. Com. 139.) *Remedies for the injury of abduction*; W. C.

1°. Trespass *vi et armis, de uxore rapta et abducta*.

To recover damages commensurate with the injury.

The husband and wife *may sue jointly*, or the husband may sue alone, with the averment *per quod consortium amisit*. (1 Chit. Pl. 83-'4, 192; 3 Bl. Com. 139.)

2°. Trespass on the Case.

To recover damages in like manner as in trespass *vi et armis*. At common law, when husband and wife sue together, they cannot maintain this action, but must bring trespass. When the husband sues alone, he may regard the injury as not occasioned *directly*, but as arising only *consequentially* from the force, and then the proper action would be trespass on the case. (1 Chit. Pl. 153; 3 Bl. Com. 139.)

In Virginia, under our statute, trespass on the case is always proper. (V. C. 1873, c. 145, § 6.)

2°. Adultery, or Criminal Conversation with Wife, and Remedies.

Adultery or criminal conversation with a man's wife, may be regarded both as a *crime* and a civil *injury*. In ancient times, it was inquirable in the local tribunals of *tourns* and *leets*, and was punished by fine and imprisonment; and so recently as the commencement of the seventeenth century, attempts were made in parliament to bring the offence more emphatically within the pale of criminal jurisdiction; but they were ineffectual. (5 Parl. Hist. 88.) During the commonwealth an act was passed, the provisions of which made adultery a *capital felony* in both parties, with some exceptions where the offence was supposed to be mitigated on the man's side by his ignorance that the woman was married, and on the part of both by the husband's reputed death, or absence beyond seas, or without being heard of for three years. At the restoration this law was not renewed, and indeed if it had been, and had been faithfully executed, there must have been speedily an entire new importation of lords and ladies to compose the court of Charles, who himself setting the example, and vigorously seconded by his brother, the Duke of York, afterwards James II, filled all England, at least as far as the influence of the court extended, with a shameless and beastly lewdness, unparalleled in that country before or since. Nor, it is believed, has any subsequent legislation been had in England to inflict temporal penalties upon the crime, it being left wholly to the censures of the ecclesiastical courts, according to the rules of the canon law; a law, says Blackstone, (4 Bl. Com. 65), "which has treated the offence of incontinence, nay even adultery itself, with a great degree of tenderness and lenity; owing, perhaps, to the constrained celibacy of its first compilers." See 2 Burn's Ecc. Law, 402 & seq. With us in Virginia, it is put on the same footing as fornication, and is punished by fine of *not less than* twenty dollars. (V. C. 1873, c. 192, § 6); Crim. Synops. 172-'3.)

For adultery, considered as a civil injury (and surely there can be none greater), the law gives satisfaction as far as satisfaction is possible, by action against the adulterer, wherein the damages recovered are usually very large and exemplary. But these are properly increased or diminished by circumstances, such as the rank and fortune of the plaintiff and defendant; the relation or connexion between them; the seduction or otherwise of the wife from the paths of virtue, as derived from her *previous* behavior and character; and the husband's obligation, by marriage settlement or other-

wise, to provide for those children which he cannot but suspect to be spurious. (3 Bl. Com. 189.)

As to the *nature of the evidence* which is sufficient to establish the commission of the act of adultery, it can seldom be direct, but for the most part must consist of such proximate circumstances as would lead the guarded discretion of a reasonable and just man to the conclusion of guilt. The facts are not of a technical nature, but are such as are determinable upon common grounds of reason. Upon such subjects the rational and the legal interpretation must be the same. Thus, *general cohabitation* excludes the necessity of the proof of particular facts. And in examining the proofs, they will not be taken insulated and detached, but the whole together. To infer adultery from general conduct, it seems necessary, as Sir William Scott has observed, that a *suspicio violenta* should be created; but when the adulterous disposition of the parties has been once established, the crime may be inferred from circumstances of strong suspicion, which would not have otherwise justified the conclusion. (2 Greenl. Ev. § 40, 41; Loveden v. Loveden, 2 Hagg. Consist. Rep. 2, 3, &c; Williams v. Williams, 1 Hagg. Consist. Rep. 299; Soilleaux v. Soilleaux, 1 Hagg. Consist. Rep. 373.) The birth of a child, non-access of the husband being satisfactorily shown, is of course proof of the wife's adultery; and that of the husband is proved by habits of adulterous intercourse; by the acknowledgment of another woman's child as his; by his visiting a *known brothel*, unless the presumption be rebutted by peculiarly satisfactory evidence, and by other similar circumstances. (2 Greenl. Ev. § 44.) The *confession* of the guilty party in this, as in other cases, is, when voluntary and without collusion, a weighty and effectual proof; and especially when the consequences of the confession are altogether against the party confessing. But in suits for adultery, where the principal object is *separation*, there is so much danger of collusion that confessions in such cases are received with great jealousy and caution. (2 Greenl. Ev. § 45, & seq.) In actions for adultery, and in criminal prosecutions for *bigamy*, a marriage in fact must be proved; though generally in other cases, reputation and cohabitation are sufficient evidence of marriage. (3 Bl. Com. 140; 1 Insts. Com. & Stat. Law, 259, 260; 2 Greenl. Ev. § 49.)

It is a defence to an action for adultery that it was committed by *collusion* between husband and wife, in order to obtain a separation or to support an action, or that the husband was guilty of *connivance* or *passive suf-*

ferance and *acquiescence*, with the intention and in the expectation that guilt would follow, or that the husband suffers his wife *to live as a prostitute*, or, *it is said*, that the husband and wife have separated by articles of agreement, and the husband has *released all claim to the person of his wife*; the gist of the action being the loss of the comfort, society, and assistance of the wife. But if the evidence falls short of actual connivance, and only establishes negligence, or even loose and improper conduct in the husband, not amounting to consent, it is no *bar to an action* for criminal conversation, but goes only in reduction of the damages. (2 Greenl. Ev. § 51.)

In proof of *damages on the part of the plaintiff* in an action for adultery, evidence is admissible to show the state of domestic happiness in which the parties had previously lived; the relations, whether of friendship, blood, confidence, gratitude, hospitality, or the like, which subsisted between the husband and the defendant, and the circumstances attendant upon the intercourse of the parties. The state of the affections and feelings of the husband and wife towards one another prior to the adulterous intercourse, may be shown by their *previous* conversation, deportment and letters; and the language and letters of the wife addressed to other persons are received as evidence for the same object. As the husband, by bringing the action, puts the wife's character in issue, the defendant may show, not indeed by way of defence to the action, but in *mitigation of damages*, the *previous* bad character and conduct of the wife, whether in general or in particular instances of unchastity; her letters to, and deportment towards himself tending to prove that she made the first advances, the husband's criminal connection with other women, the bad terms on which he lived with his wife, his improper treatment of her, his gross negligence and inattention in regard to her conduct with respect to the defendant, and any other facts tending to show either the little intrinsic value of her society, or the light estimation in which he held it. But no evidence of the misconduct of the wife *subsequent* to her connection with the defendant can be received. (2 Greenl. Ev. § 55, 56.)

The doctrine in respect to the limit of damages in actions for adultery, as laid down by Mr. Greenleaf, (2 Greenl. Ev. § 253,) is, that they are given "as a compensation, recompense, or satisfaction to the plaintiff for an injury actually received by him from the defendant. They should be *precisely commensurate with the injury*, neither more nor less; and this whether it be to his per-

son or estate." On the other hand, Mr. Sedgwick, in his treatise on "The Measure of Damages in Suits at Law," (p 38,) states the doctrine thus: "Thus far we have been speaking of the great class of cases where no question of *fraud, malice, gross negligence, or oppression* intervenes. Where either of these elements mingle in the controversy, the law, instead of adhering to the system, or even the language of *compensation*, adopts a wholly different rule. It permits the jury to give what it terms *punitive, vindictive, or exemplary* damages; in other words, blends together the interest of society and of the aggrieved individual, and gives damages, not only to *recompense the sufferer, but to punish the offender.*" And in another passage (p. 453 & seq.) he proceeds to show that this rule is settled in England and in the general jurisprudence of the United States.

See Mr. Greenleaf's reply to Mr. Sedgwick, 2 Greenf. Ev. § 253, n 2, and Mr. Sedgwick's rejoinder, or at least, his comment on Mr. Greenleaf's position, Sedgw. Dam. 466, note.

It is apprehended that Mr. Sedgwick's statement of the doctrine is to be preferred to Mr. Greenleaf's, as more conformable both to reason and authority. See Chan. Kent's approval of it, 1 Kent's Com. 618, (ed. 1851.)

Remedies for Adultery; W. C.

1^h. Action of *Trespass on the Case*.

To recover damages of the adulterer for the wrong, the damages being estimated in the manner above described. (1 Chit. Pl. 153; 2 Rob. Pr. (2nd ed.) 553-'4; 3 Do. 431-'2; V. C. 1873, c. 145, § 6.)

2^h. Action of *Trespass vi et armis*.

To recover in like manner damages of the adulterer. This action is concurrent with the action of trespass on the case for this injury, upon the principle that force is necessarily implied, the wife having *no power to consent*; and in England it is deemed the preferable form, because there may be joined counts for breaking and entering the plaintiff's house, or if the facts warrant it, for beating the plaintiff himself. (1 Chit. Pl. 192, 193; Guy v. Livesay, 3 Cro. (Jac.) 501; Woodward v. Walton, 2 Bost. & Pul. N. R. 480-'81 & seq; Ditcham v. Bond, 2 M. & S. 436; 3 Rob. Pr. (2nd ed.) 431-'2.)

The husband may also obtain a divorce, *a mensa*, at common law, and in Virginia, *a vinculo matrimonii*, for the adultery of his wife. See 1 Insts. Com & Stat. Law, 255, 264.

3^g. Beating of the Wife, or otherwise Ill-using her.

If the beating or ill-usage be only a common assault, battery, or imprisonment, the law gives a remedy to recover compensation in damages, which, however, ought to be prosecuted in the names of the husband and wife *jointly*; but if the beating or other maltreatment be very enormous, so that thereby the husband is deprived for any time of the company and assistance of his wife, the law then gives him a remedy by a separate action, in which the wife does not join, for this ill-usage, *per quod consortium amisit*; wherein he shall recover a satisfaction in damages, not for the pain and injury sustained by the wife, but for such as he has personally and individually suffered by the loss of her society and aid in his domestic affairs, and by the charges to which he has been subjected in consequence of the defendant's wrong-doing. (8 Bl. Com. 140.)

Remedies for the Beating, or other Ill-usage of the wife;
W. C.

1^h. Action of Trespass *vi et armis*.

If the husband and wife unite in the action, this is, at common law, the proper and only action for the beating of the wife, or any similar ill-usage, accomplished *by force*; but if the husband sue alone, whilst he may and perhaps had better employ this form of action, for the reason that he may join other counts for a battery, &c., to himself, he may also sue in trespass on the case. (1 Chit. Pl. 192-'3; *Guy v. Livesay*, 3 Cro. (Jac.) 501; *Woodward v. Walton*, 2 Bos. & Pul. N. R. 480-'81 & seq; *Ditcham v. Bond*, 2 M. & S. 436; 2 Insts. Com. & Stat. Law, 378, 380; 3 Bl. Com. 140.)

2^h. Action of Trespass on the Case

At common law, this action is proper only where the husband sues alone, the injury being at his election, either the direct or the consequential resultant of the force employed by the wrong-doer; but as observed in the preceding paragraph, and as implied in what has just been said, the action of trespass *vi et armis* also lies. (1 Chit. Pl. 192-'3; *Batchelor v. Biggs*, 2 Wm. Bl. 855 & n (e).)

In Virginia, it will be remembered, "In any case in which an action of trespass will lie, there may be maintained an action of trespass on the case." (V. C. 1873, c. 145, § 6.)

2ⁱ. Injuries done to one in the Relation of Parent or Guardian.

The only injury which can be done to one in the relation of guardian, is by the *abduction* of his ward, which

also is *one of the injuries* to which a parent is exposed, and, therefore, the two relations may be considered together, the injuries being classed under the following heads: (1), Abduction of the child or ward; (2), Beating of the child; (3), Seduction of daughters;
W. C.

1^s. The Abduction of a Child or Ward.

There has never been made any doubt that the abduction of a ward from his *guardian* is an injury remediable by law; but strange as it may seem, it has been much questioned whether the taking away an infant child from his *parent* is a civil injury for which any action lies. Before the abolition of tenure in chivalry, (which was by 12 Car. II, c. 24, A. D. 1660), it was pretty well settled that an action would lie for taking and carrying away a child that was the *parent's heir*, because he might thereby lose the *value of his marriage*, (the writ shall say *cujus maritagium ad ipsum pertinet*); but it seems to have been as well settled that for no other child would an action lie. (Ratcliff's Case, 3 Co. 38 a & b, Barham v. Dennis, 2 Cro. (Eliz.) 770; Eyre v. Countess of Shaftsbury, 2 P. Wms. 116.) When, therefore, by the abolition of the military tenures in chivalry, the father ceased to be entitled to the value of the *marriage* of his son and heir, it was not unnaturally doubted whether, upon the principles of the common law, an action would lie for the abduction of any child. Blackstone expresses the opinion, however, (although the authorities *he cites* hardly sustain the conclusion), that the abduction of *any child* from either parent, entitled to its custody, was at common law, and of course still is, a civil injury, for which the parent may maintain an action. (3 Bl. Com. 140-'41.) And indeed, although the authorities of Blackstone afford little aid to his conclusion, (they are in truth adverse to it), yet it is hardly possible to doubt that, as it is admitted that a parent is entitled to the *custody and education* of every one of his infant children, a right for which nature irresistibly pleads, so there must be a remedy whereby the invasion of that right, by the abduction of the child, may be effectually redressed. See 2 Kent's Com. 193, 205; King v. De Manneville, 5 East. 221; 1 Insts. Com. & Stat. Law, 397 to 402.

Remedies for the abduction of Child or Ward; W. C.

1^b. Action of Trespass *vi et armis*, or in Virginia, of Trespass on the Case.

In this action the parent or guardian recovers such damages as a jury shall deem proper to compensate

for the injury, but *not the body of the ward*. (1 Chit. Pl. 192; *Gilbert v. Schwench & ux*, 14 M. & W. 488; 1 Insts. Com. & Stat. Law, 438.) Whilst in Virginia, in consequence of the statute so often cited, (V. C. 1873, c. 145, § 6,) there can be no doubt that the action of trespass *on the case* will lie for this injury, as well as trespass *vi et armis*. It seems that at common law also, case is available, wherein in like manner damages are recoverable. (1 Chit. Pl. 192-'3.)

2^b. The Writ of *Ravishment of Ward*.

By this writ, given by statute 13 Edw. I, c. 35, is recovered the *body of the child, together with damages for the taking and detention*, and not damages alone as in the remedy last mentioned. The statute is *in terms* applicable to *guardians*, but a parent may employ it as a *guardian by nature*. (1 Bl. Com. 463, n (9); 1 Th. Co. Lit. 338; Bac. Abr. Guardian, (F); 1 Insts. Com. & Stat. Law, 401, 438.)

This being a *remedial writ*, given by statute prior to 4 Jac. I, not local to England, it is reserved in Virginia by statute, (V. C. 1873, c. 15, § 2), for the use of our people. (1 Insts. Com. & Stat. Law, 401, 438.)

3^b. The Writ *de Custodia Terræ et Hæredis*.

This remedy is applicable exclusively to *guardians*, namely, guardians *in chivalry and in socage*; and as we have here no such tenures as chivalry and socage, and, therefore, no such guardians, the proceeding is unknown with us. (1 Insts. Com. & Stat. Law, 438.)

4^b. The Writ of *Habeas Corpus*.

The writ of *habeas corpus* is applicable to recover the possession of a child or ward, when it is too young to exercise any choice as to the person with whom it prefers to remain. As any custody but the rightful one is then an *unlawful confinement*, the court, in order to give its legitimate effect to the writ, must determine who is entitled to the custody. (1 Insts. Com. & Stat. Law, 401-'2, 438-'9; *Armstrong v. Stone & ux*, 9 Grat. 102.)

5^b. The Bill in Equity.

The bill in equity is generally the most direct, eligible and usual remedy to try the right of a parent or guardian to the custody of a child or ward. The court of chancery, as representing the parental and protecting power of the commonwealth, has jurisdiction to determine controversies touching the guardianship of a minor; and in extreme cases, as we have seen, even to control and supersede the right of a parent to the cus-

tody of his child. (2 Stor. Eq. § 1340; 1 Insts. Com. & Stat. Law, 402, 398, 439.)

2^g. The Beating of Children.

This is an injury of which it is believed parents alone (besides the child) can complain, and not the guardian, because the guardian has no right to the ward's services, and cannot, therefore, be said to be injured by his being beaten or otherwise ill-used. *Sed quære*;

W. C.

1^h. Action of Trespass *vi et armis*.

As the loss of service, *the consequence of the beating*, is the ground of action, the plaintiff, it would seem, would at common law be *at liberty* to declare in trespass on the case. But when the action is thus for an injury really committed with force, it is also admissible to declare in trespass; and there is an advantage sometimes in doing so, where it would be desirable to join other counts for additional wrongs effected by force. (1 Chit. Pl. 153, 194; Woodward v. Walton, 2 Bos. & Pul. N. R. 480-'81 & seq; Ditcham v. Bond, 2 M. & S. 436.)

2^h. Action of Trespass on the Case.

The action of trespass on the case seems to lie at common law in favor of a parent for the beating of his infant child, the injury (the loss of service), being the consequence, and not the direct effect of the defendant's wrong-doing, (1 Chit. Pl. 153); but however it may be at common law, in Virginia, by statute, (V. C. 1873, c. 145, § 6), trespass on the case may certainly be maintained.

Whichever action is employed, the recovery in damages for the beating of the child is the same, and in either case is such an amount as a jury shall estimate will afford an adequate satisfaction for the wrong done, having reference to the explanation already given of those cases where it is allowable to make the damages punitive, vindictive, or exemplary. (*Ante*, p. 434.)

3^g. The Seduction of Daughters.

This also is an injury in which, as is supposed, a guardian can have no part, but that it is confined to parents, or at least to near relations, no action lying, it is believed, in behalf of a guardian for the seduction of his female ward. The parent himself is allowed to maintain the action, not in his character of *parent*, but of *master* entitled to the service of the daughter, and therefore entitled to recover for the loss of service resulting from the seduction. Although, when upon that ground the court and jury have obtained legal cognizance of the cause,

the damages to be recovered from the seducer are not limited by the value of the services lost, to which indeed not the slightest regard is had; but such damages are regulated by the moral, domestic, and social aspects of the wrong, being always of the character described by Mr. Sedgwick as *punitory, vindictive, and exemplary*. (3 Bl. Com. 140, n (27.); Sedg. Dam's 38, 453 & seq; *Ante*, p. 434.)

At common law it is necessary, in order to maintain the action, to prove that there existed between the parent and child *the relation* of master and servant, and also *some acts of service*, although the most trifling are sufficient. There is no need to prove *a contract* of service; and if the daughter be *under age*, she is presumed to be still under the parent's control and protection, although she does not reside with him; but if she be of age, she must be in her father's service, so as to constitute *in law* and *in fact* the relation of master and servant; and, therefore, if she be residing elsewhere than in his family when the seduction takes place, he cannot maintain the action, unless it appear that, notwithstanding her residence elsewhere, she was still *in his service*, and was absent with the intention of returning to his roof. (3 Bl. Com. 140, n (27); Postlethwaite v. Burke, 3 Burr. 1878; Bennett v. Allcott, 2 T. R. 166; Nickles v. Stryker, 10 Johns. (N. Y.) 115; 2 Rob. Pr. (2nd ed.) 557 & seq; Lee v. Hodges, 13 Grat. 729-'30.)

In Virginia, by statute (V. C. 1873, c. 145, § 1), "An action for seduction may be maintained without any allegation or proof of the *loss of the service of the female* by reason of the defendant's wrongful act." But this does not dispense with the necessity of proving the *relation of master and servant*, so that if it appears that that relation does not exist, the action cannot be supported. (Lee v. Hodges, 13 Grat. 738 & seq; Grinnell v. Wells, 7 Man. & Grang. (49 E. C. L.) 1038; Hewitt v. Prime, 21 Wend. (N. Y.) 80; 2 Rob. Pr. (2nd ed.) 561-'2.)

The daughter is a competent witness, and in order to enhance the damages, may prove that the defendant promised to marry, and had thus debauched her. (White v. Campbell, 13 Grat. 573); and although she is not an *indispensable* witness, yet the omission on the part of the plaintiff to examine her would be open to observation, and would probably affect injuriously the plaintiff's cause. (Farmer v. Joseph, 1 Holt. (3 E. C. L.) 451.) We have seen that the daughter may be allowed to prove that defendant prevailed by a promise of marriage, (contrary to Lord Ellenborough's ruling in Dodd v. Norris, 3 Campb.

519); and *a fortiori* may evidence be given that defendant professed to visit the family, and was received there as the daughter's suitor. (*Elliott v. Nicklin*, 5 Price (2 Eng. Exch.) 641.)

The defendant, in mitigation of damages, may adduce evidence of the improper, negligent and imprudent conduct of the plaintiff himself; as where he knew that defendant was a married man, and allowed his visits in the expectation of a divorce; and so evidence of the unchastity of the daughter with other men is also admissible *in mitigation*. (*Verry v. Watkins*, 7 Car. & P. (32 E. C. L.) 628; 3 Bl. Com. 140, n (27).)

Expenses actually incurred, including such as plaintiff is legally bound to pay, although he may not have paid them, should be included in the estimate of damages, in making up which the jury may and ought to consider the wounded feelings, distress and anxiety suffered by the plaintiff, and the state of the family, where there are other children whose morals may be corrupted by the example of an erring sister, and whose prospects in life may be clouded by her disgrace. (*Bedford v. McKoul*, 3 Esp. 120; *Andrews v. Arkey*, 8 Car. & P. (34 E. C. L.) 7; *Dixon v. Bell*, 1 Stark. (2 E. C. L.) 287.)

Remedies for Seduction of Daughter; W. C.

1^h. Action of Trespass *vi et Armis*.

The action of trespass *vi et armis* lies for the seduction of a daughter on the same principle, as we have seen, authorizes it in case of adultery with a wife, namely: that the female, in either case, is considered as having *no power to consent*. And the same consideration renders it frequently the more eligible action; as that a count for breaking and entering the father's premises, or for some other violent injury, may also be introduced. (1 Chit. Pl. 152-'3; *Woodward v. Walton*, 2 Bos. & Pul. 476, 480 & seq; *Ditcham v. Bond*, 2 M. & S. 436.)

2^h. Action of *Trespass on the Case*.

The action of trespass on the case seems certainly to lie for the seduction, the injury, in one aspect at least, being *consequential* and not *immediate* upon the force. But at all events, such action lies in Virginia by statute. (V. C. 1873, c. 145, § 6.)

In both these actions damages are recovered such as a jury shall think an adequate compensation for the wrong.

It may be mentioned also, that our statutes punish as a *felony*, in the discretion of the jury, the illegal seizing, taking or secreting a *child* (no age indicated),

from the person having lawful charge of such child. (V. C. 1873, c. 188, § 18); and also as a felony, the taking away, and detaining against her will, any female, with *intent to marry or defile her*, or to cause it to be done, or the taking from any person having lawful charge of her, a female under *sixteen years* of age, for the purpose of *concubinage or prostitution*. (V. C. 1873, c. 187, § 17.) They likewise punish *as a felony* the seduction of any unmarried female of previous chaste character *under promise of marriage*. (V. C. 1873, c. 187, § 16.)

3^d. Injuries done to Persons *in the Relation of Master*.

To the relation between *master and servant*, and the rights accruing therefrom, there are three species of injuries incident, namely: (1), Retaining another man's servant before his time is expired; (2), Beating or confining, or otherwise mis-using him in such a manner that he is not able to perform his work; and (3), Seducing a female servant, so that by the consequences thereof the master loses her services;

W. C.

1st. Retaining another man's servant *before his time has Expired*.

To retain another man's servant during the time he has agreed to serve his present master, as it is an ungentleman-like, so it is also an illegal act. For every master has by his contract purchased for a valuable consideration the service of his domestics, and other servants for a limited time; the inveigling or hiring them, therefore, which induces a breach of this contract, is an injury to the master; and for that injury the law gives him a remedy; and he may also have an action against the servant for the non-performance of his agreement. But if the new master was not apprized of the former contract, no action lies against *him*, unless upon demand he refuses to restore the servant. (3 Bl. Com. 141-'2.)

Remedies for Retaining another man's servant; W. C.

1^h. Action of Trespass on the Case.

The injury being one not accomplished by force, either actual or implied, trespass *vi et armis* is never proper. The redress is afforded in trespass on the case, by means of damages assessed by a jury, and such as the jury shall deem adequate, subject as in other cases, to the considerations which in law limit the jury's discretion. (Sedgw. Dam. 88, 545.)

2^h. In case of Apprentices, Trespass on the Case in *Assumpsit*, or *Debt*.

In the case of an apprentice, provision is made by statute (V. C. 1873, c. 122, § 16,) that where one

knowingly employs, conceals, or harbors him, he shall pay the master \$3 a day, for each day, *in addition to the damage* sustained by the master, and be required moreover to enter into a recognizance to keep the peace and be of good behavior. And this penalty of \$3 a day the master may recover, as all other legal penalties are recovered, by the action of *debt* or of *assumpsit*, or in Virginia *by motion*. (3 Bl. Com. 159 to 161; V. C. 1873, c. 163, § 6; Id. c. 147, § 1.)

It may be also mentioned that besides these two sorts of amends *to the master*, where the wrong-doer actually *entices* the apprentice away from the master, or without the latter's consent, *takes or carries* him away, he forfeits *to the commonwealth* a fine of \$20. (V. C. 1873, c. 122, § 16.)

2^d. Beating or otherwise Misusing the Servant, so that he cannot render to the Master full service.

This injury depends upon the same principle as the last, viz: the property which by his contract the master has acquired in the labor of the servant. And in this case the servant also has a right of action for the injury done to *him*, which is quite distinct from that suffered by the master. (3 Bl. Com. 142.)

The ground of action, on the part of the master, is the *loss of service* (the averment in the declaration being *per quod servitium amisit*,) and it seems that nothing can be recovered but the value of the services lost, and whatever incidental expenses of illness, &c., may have been incurred. It is not a case for *exemplary* or *vindictive* damages; and it would seem that nothing can be allowed for injury to feelings, &c. (Sedgw. Dam. 553-'4.)

Remedies for Beating, &c., Servant, &c.

W. C.

1^h. Action of Trespass *vi et armis*.

By this action damages are recovered by the master, commensurate with the injury suffered, the measure being for the most part only the loss of service ensuing from the beating. (1 Chit. Pl. 158, 192.)

2^h. Trespass on the Case.

As the damages to the master from the beating of the servant are *consequential*, the action may be at common law trespass on the case, *per quod servitium amisit*. (1 Chit. Pl. 153, 192.) But in Virginia, our statute allowing an action of trespass on the case to be brought wherever trespass *vi et armis* would lie, (V. C. 1873, c. 145, § 6), removes all possibility of doubt.

3^d. Seduction of Female Servants.

It is under the guise of this injury, as we have seen, and

thus only, that a *parent* is allowed to bring before a jury the great outrage of the betrayal of a daughter's innocence. To be sure, when it is made to appear that the relation of master and servant exists, and that any, the slightest loss of service has occurred, the case being thus technically brought within the cognizance of the jury, they may and do give such damages as the real nature of the wrong demands, without any regard to the grounds on which the action is founded. In other cases of seduction of female servants, however, where no other relation exists but that of master and servant, the damages are more uniformly, and perhaps *invariably* measured by the mere *loss of service*. But see Sedgw. Dams. 542 to 544, 553-'4.

Remedies for seduction of female servant: W. C.

1^a. Action of Trespass *vi et armis*.

The action of trespass *vi et armis* is admissible because, as we have seen, the female has *no power to consent*, and, therefore, in contemplation of law, the injury is accomplished with force; and trespass is commonly preferred to trespass on the case, inasmuch as it allows other counts for breaking and entering the master's premises, &c., to be inserted. (1 Chit. Pl. 153, 192.) The recovery, of course, is *in damages*, according to a jury's estimate of the wrong inflicted, as already explained.

2^a. Action of Trespass on the Case.

Trespass on the case lies at common law, the measure and mode of recovery (*in damages*), being the same as in trespass, (1 Chit. Pl. 153, 192), and *a fortiori* under our statute. (V. C. 1873, c. 145, § 6.)

It will be remembered, that in Virginia "an action for seduction may be maintained without any allegation or proof of the *loss of the services of the female*, by reason of the defendant's wrongful act," (V. C. 1873, c. 145, § 1); a provision which is interpreted to mean that it is the *loss of service*, the allegation and proof of which are dispensed with, and *not the relation of master and servant*, which must still be alleged and proved as before. (Hodges v. Lee, 13 Grat. 726.)

And here the observation may be reiterated, that by recent statute, seduction under *promise of marriage*, of an unmarried female, of previous chaste character, is declared to be a *felony*, punishable by confinement in the penitentiary from *one to ten years*; but with the *proviso* that the subsequent marriage of the parties may be pleaded *in bar of a conviction*, which last is possibly the

best result the statute is likely to accomplish. (V. C. 1873, c. 187, § 16.)

Before passing from the contemplation of the injuries done to the several *relative rights*, the student is desired to observe, that the law takes notice only of the wrong done to the *superior* of the parties related, by the breach and dissolution of either the relation itself, or at least, the advantages accruing therefrom; while the loss of the *inferior*, by such injuries is totally unregarded. One reason for which, as Blackstone observes, may be this, that the inferior hath no kind of property in the company, care, or assistance of the superior, as the superior is held to have in those of the inferior; and, therefore, the inferior can suffer no loss or injury. The wife cannot recover damages for the beating of her husband, nor for his adultery, for she hath no separate interest in anything, in a court of law, during the coverture. The child hath no property in his father or guardian, as they have in him, for the sake of giving him education and nurture. Yet by the old common law, the wife or the child, if the husband or parent *be slain*, has a peculiar species of criminal prosecution allowed in the nature of a civil satisfaction, which is called an *appeal*. (3 Bl. Com. 142-'3.) And in Virginia, by statute, (V. C. 1873, c. 145, § 7 to 10), a more effective civil satisfaction is provided by means of an action. And so the servant whose master is disabled does not thereby lose his maintenance or wages. He has no property in his master, and if he receives his part of the stipulated contract, he suffers no injury, and is, therefore, entitled to no action for any battery or improvement which such master may happen to endure.

2^d. Wrongs which *Affect the Property*, and Remedies therefor.

We are now to enter upon the discussion of such injuries as affect the *rights of property*, together with the remedies which the law has given to repair or redress them. And here it is natural to follow the division of property into personal and real: *personal*, which consists in goods, money, and all other moveable chattels and things thereunto incident—a property which may *attend a man's person* wherever he goes, and from thence receives its denomination; and *real property*, which consists of such things as are permanent, fixed and immovable, as lands, tenements and hereditaments of all kinds, which are not annexed to the person, nor can be moved from the place in which they subsist.

First, then, we are to consider the injuries that may be offered to the rights touching *personal property*; and of these,

first, the rights touching personal property in *possession*, and then those that are *in action* only. (3 Bl. Com. 144);
W. C.

1°. Wrongs which affect *Personal Property*, and Remedies therefor; W. C.

1^f. Wrongs which affect *Personal Property in Possession*, and Remedies therefor.

The rights which relate to *personal property in possession* are liable to two species of injuries; the amotion or *deprivation* of that possession; and the *abuse or damage* of the chattels, while the possession continues in the true and legal owner. The former, or deprivation of possession, is also divisible into two branches: the unjust and unlawful *taking them away*; and the unjust *detaining them*, though the original taking might be lawful. (3 Bl. Com. 144);

W. C.

1^g. Wrongs to Personal Property in Possession, by *Deprivation of the Possession*, and Remedies therefor; W. C.

1^h. Wrongs to Personal Property in Possession by *Unlawful Taking*, and Remedies therefor.

The right of property being once legally acquired and preserved, and transmitted by proper legal modes of conveyance, it follows that when I have gained a *rightful possession* of any goods and chattels, by whatsoever means, whoever either by fraud or force dispossesses me of them, is guilty of a transgression against the law of society, and indeed, secondarily, against the law of nature; for there must be an end of all social commerce between man and man, unless private possessions be secured against unjust invasions; and if an acquisition of goods, by either force or fraud, were allowed to be a sufficient title, all property would soon be confined to the most cunning or the strongest, and the weak and simple-minded part of mankind (which is by far the most numerous division), could never be secure of their possession.

The *wrongful taking* of goods being thus most clearly an injury, it remains to inquire into the appropriate remedies for obtaining satisfaction therefor. (3 Bl. Com. 145,)

Remedies for the Unlawful Taking of Goods; W. C.

1ⁱ. Action of *Replevin*.

To replevy (*re-plegiare*), means to *deliver back* goods and chattels upon *pledges* (*plegi*). The *pledges* or security may be to do any thing that may be stipulated; *e. g.* to pay money, to have the property in question, or any other, forthcoming to be sold, &c., to

prosecute with effect a suit touching the title, and to comply with the judgment of the court, &c., &c. The action of replevin is designed to recover the specific chattel which is alleged to have been unlawfully taken, and derives its name from the circumstance that it is begun by an *immediate restoration* of the property to the party complaining, upon his executing a bond with good security (*plegi*), to prosecute with effect his action to try the title, and to comply with the judgment of the court. If the plaintiff is successful he not only recovers his goods, (which, as we have seen, are restored to him at the very commencement of the proceedings,) but *damages also*, for the taking and the detention. (3 Bl. Com. 145, & n (1); (1 Chit. Pl. 185 & seq; Rob. Forms, 3, 384, 122.)

This is an extremely wholesome and effective remedy for *any unlawful taking of goods* by whatsoever means, and is not restricted, as Blackstone represents, (3 Bl. Com. 145,) to unlawful taking *by way of distress*. (1 Chit. Pl. 188; Shannon v. Shannon, 1 Sch. & Lefroy, 324, 327.) It has, however, it seems, been rarely employed save in connection with unlawful distresses, and in Virginia, by act of 1823, was expressly limited thereto, although prior to that statute it had been held with us to be applicable to *any case* of unlawful taking. (Vaiden v. Bell, 3 Rand. 448; see 3 Rob. Pr. (2nd ed.) 473-'4.)

At the revision of the laws, in 1849, the revisors, in view of the previous statutory restriction of replevin to unlawful distresses, and its restriction *in practice* to the same for an indefinite time previously; and in view also of the fact, that in consequence of the narrow range of its application, counsel were comparatively unfamiliar with its use, thus making the proceedings in it more perplexing and dilatory than its forms required, recommended that it be either expressly made applicable to all manner of *illegal taking*, or be *abolished*, indicating a preference for the latter. Accordingly it was enacted that "no action of replevin shall be brought after the commencement of this chapter, (July 1st, 1850,) except for a cause of action which arose before such commencement, and for which it was capable of being brought at the time the same arose." (V. C. 1873, c. 145, § 4; 3 Rob. Pr. (2nd ed.) 482-'3.)

It was obviously needful, however, to supply the place of replevin with some other proceeding, which the revisors essayed to do by means of the process of

interpleader, and of the *forthcoming or delivery bonds*, no very inadequate substitutes for replevin as it existed under the act of 1823, but very insufficient indeed, according to the common law idea thereof. (3 Rob. Pr. (2nd ed.) 482-'3; V. C. 1873, c. 149, § 2, 3, 6, 7; Id. c. 189, § 1, 4.)

2^d. Action of Detinue.

The design of the action of detinue is to recover the specific chattel *illegally taken*, (and of course, therefore, *illegally detained*,) together with damages for the detention. And in case the specific chattel is not to be had, the *value* thereof is to be recovered, together with damages for detention. The action itself contemplates that it may be needful to resort to the alternative of recovering the value; and, therefore, as well in the writ of summons as in the declaration, the value of the chattel is stated. (1 Chit. Pl. 137 & seq; 3 Rob. Pr. (2nd ed.) 467 & seq; *Ante* p. 348.)

It is a common doctrine in the books (sanctioned by Blackstone, 3 Bl. Com. 151,) that the action of detinue cannot be supported where the defendant *took the goods wrongfully*; an opinion which, adverse as it is to convenience and to apparent reason, seems to have no better foundation than the *dictum* of *Brian, C. J.*, in the time of Henry VII, who is reported in the year book, 6 H. 7, 9, to have held that in such case the action would not lie, and on the fallacious reasoning that by the trespass the plaintiff's title to the chattel was *divested*, and consequently that at the commencement of the action the ownership was not in him.

Even in the same case, *Vavasor, J.* was of a contrary opinion, and the chief-justice's idea, that the property can be changed by the trespass, is altogether without foundation, for even though the trespasser should *die possessed*, the property is still not altered. It would indeed be, moreover, an anomalous thing to allow the defendant to derive a benefit from his own wrong. The inconvenience of the supposed doctrine is also a strong argument against it, and as Lord Coke says, "an argument *ab inconvenienti*, is strong to prove it (any doctrine) against law, as often hath been observed." (1 Th. Co. Lit. 18.) For if the doctrine in question were law, many cases of unlawful taking would be without adequate remedy. Thus, as it was said by Willes, C. J., in *Kettle v. Bromsall*, Willes, R. 120, "in *trover* only damages can be recovered; but the things lost may be of that sort, as medals, pic-

tures, or other pieces of antiquity, (and this seems to be the present case,) that no damages can be an adequate satisfaction; but the party may desire to recover the things themselves, which can only be done in detinue." Upon the whole, there seems no reason to doubt that detinue lies wherever a specific chattel is unlawfully *withheld* by the wrong-doer, whether it were originally taken lawfully or unlawfully. (1 Chit. Pl. 138, 140.)

Detinue is in one particular an anomalous action; it is difficult to decide whether it ought to be classed amongst actions *ex contractu* or *ex delicto*. The right to join detinue with debt, and the ability to use detinue to recover goods in pursuance of the terms of a bailment to defendant, seem to afford grounds for reckoning it an action *ex contractu*; whilst the fact that it lies wherever the chattel in question is *illegally withheld*, notwithstanding there be *no contract*, but the possession of defendant was acquired exclusively *by tort*, mark it as an action *ex delicto*. Upon the whole, it seems most proper to range it in the latter class of actions. (1 Chit. Pl. 138.)

The action of detinue was at common law liable to the trial by *wager of law*, (*Ante*, p. 368, &c.), which led in a great degree to the disuse of the action. But in Virginia it is a usual action, and was formerly especially frequent for the recovery of *slaves*, who, for the most part, possessed in the eyes of claimants thereof, a *pretium affectionis*, which made the latter desirous to recover them specifically. (3 Rob. Pr. (2nd ed.) 468; Austin's Ex'or v. Jones, Gilm. 350.)

The judgment in detinue is that plaintiff "recover against the defendant the specific chattel demanded, of the price of — dollars, as aforesaid, (that is, as ascertained by the verdict of the jury), if the same is to be had; but if not, then the price aforesaid of the same, together with his damages assessed as aforesaid, (*i. e.* by the jury), and his costs about his suit in this behalf expended." (Rob. Forms, 112.) Whilst, therefore, if the chattel *has perished before the bringing of the suit*, detinue is not a proper action, (*Caldwell v. Fenwick*, 2 Dana. (Ky.) 333); yet if it perishes *pending the suit*, judgment may *probably* still be given as above, the plaintiff actually recovering, of course, only the alternative value. (Austin's Ex'or v. Jones, Gilm. 341.) *Sed quære.*

The gist of the action is the *detainer* by the defendant of the *plaintiff's property*, howsoever he came by

it, whether by bailment, by finding, or tortiously; and though a bailment or finding be stated in the declaration, it cannot be controverted, and need not be proved. The sole inquiry is, whether the *chattel is his*, and whether the defendant wrongfully detains it; and that being resolved in the plaintiff's favor, he is entitled to maintain the action. (3 Rob. Pr. 468-'9; Gledstane v. Hewitt, 1 Cr. & Jerr. 570; Whitehead v. Harrison, 6 Q. B. (43 E. C. L.) 423; Clements v. Flight, 16 M. & W. 50; Clossman v. White, 7 Man. Gr. & Scott, (63 E. C. L.) 54.)

Let it be observed, then, that in order to support an action of detinue, it is necessary, (1), That the plaintiff should have a *general or special property* in what he seeks to recover; and (2), That the defendant must himself *have had* possession of the chattel at some time *anterior to the commencement of the action*. (3 Rob. Pr. (2nd ed.) 469-'70.) Hence, where the plaintiff had committed the title-deeds of an estate to a conveyancer, in order to prepare certain family-settlements *alienating his interest*, and the settlements were prepared and executed accordingly, and defendant refused to deliver back the title papers because his charge for preparing the conveyance had not been paid, it was held that the plaintiff must be non-suited (without calling upon the defendant), for that, under the circumstances stated above, he had no property in the deeds at the time the action was commenced. (Philips v. Robinson, 4 Bingh. (13 E. C. L.) 106.) And so, on the other hand, whilst detinue lies not against one who *never had* possession of the chattel in question, it does lie against him who once had it, but has parted with it otherwise than in due course of law. (3 Rob. Pr. (2nd ed.) 470; Southcote's Case, 4 Co. 83 b.) Thus, in Jones v. Dowle, 9 M. & W. 19, which was an action of detinue for a picture bought by the plaintiff at auction, of defendant, who by mistake had delivered it to one Clift, and Clift refusing to surrender it, this action was brought against the auctioneer. It was resisted upon the ground that the defendant had parted with the picture before action brought to one over whom he had no control. But the court said that was his own fault, and that although detinue does not lie against him who *never had* possession of the chattel, yet that it does lie against him who once had, but has improperly parted with the possession. And in Burnley v. Lambert, 1 Wash. 308, 312, it was held that proof of possession at

any time *prior to the suit* is enough to charge the defendant, unless he has been *legally evicted*, that is, has parted with the possession *in a manner authorized by law*; always supposing the thing to be *in esse* at the institution of the suit. (Pool v. Adkinson & al, 1 Dana, 110, 119; Caldwell v. Fenwick, 2 Dana, 332-'3; Lynch v. Thomas, 3 Leigh, 682.) We have, in Crossfield, &c. v. Such, 8 Welsb. H. & Gord. 825, a case which rather happily illustrates the negative part of the foregoing proposition, namely, that the action of detinue lies not against him who has *never had* possession of the chattel. In that case Crossfield, as administrator of one Loveland, brought an action of detinue against the defendant, Such, for certain household furniture, which had been the property of Loveland at his death, and at the trial it appeared that Loveland had in his life-time made a will (which, however, *he did not sign*,) bequeathing his furniture in equal shares to the defendant and one Goddard; that immediately upon Loveland's death the defendant and Goddard divided the furniture between them, without knowing that, in consequence of its *not being signed*, the will was void. As soon as that was discovered, Loveland's sister, the plaintiff, became his administratrix, and demanded of the defendant, Such, not only his own half of the furniture, but also the other half, which defendant had turned over to Goddard. Such promptly gave up what was in his own possession, but contested his liability for the other moiety; and the court determined that for this latter the action did not lie, for that he did not detain the goods *as against the administratrix*, because at the time when he had them in possession there was no legal representative of the deceased, with authority either to demand or to receive them. So that, in whatever other form of action he might be liable, he could not be sued *in detinue* by the administratrix for detaining goods which, as against her, he really never did detain. (Crossfield & al v. Such, 8 Welsb. H. & Gordon, 825.)

31. Process of *Interpleader*.

This is a purely statutory remedy in Virginia, and everything in relation to it must be determined by reference to the statute. Thus, it is to be employed, not for *any illegal taking*, but only where the taking, alleged to be unlawful, is by virtue of *distress or execution*. (V. C. 1873, c. 149, § 1, 2, 4, 6, 7.)

The nature of the process, and the mode of conducting it, have been already set forth very fully,

(*Ante*, p. 350, & seq.) and to that exposition reference is now made, the student being requested carefully to go over it again in this connection.

4¹. Delivery or Forthcoming Bond.

This proceeding is also *purely statutory*, and is available for no other illegal taking save in favor of the *tenant*, in case of *distress* alleged by him to be illegal in whole or in part. The explanation already made (*Ante*, p. 354, &c.) will suffice, and the student is desired to read over that subject again.

5¹. Action of Trespass on the Case in *Trover and Conversion*.

The action of *trover and conversion* is in its nature an action of trespass upon the case, for recovery of damages against such person as had *found* another's goods and refused to deliver them on demand, but *converted* them to his own use; from which finding and converting it is called an action of *trover* (*trouver*, to find), and *conversion*. The freedom of this action from *wager of law*, and the less degree of certainty requisite in describing the goods, gave it so considerable an advantage over the action of *detinue*, that by a fiction of law, actions of *trover* were at length permitted to be brought against any man who had in his possession, by *any means whatsoever*, the personal goods of another, and sold them or used them without the consent of the owner, or refused to deliver them when demanded. The injury lies in the *conversion*; for any man may take the goods of another into possession if he finds them, but no finder is allowed to acquire a property therein unless the owner be forever unknown, and therefore he must not convert them to his own use, which the law presumes him to do if he refuses them to the owner; for which reason such refusal also is *prima facie* sufficient evidence of conversion. The fact of the finding or *trover* is, therefore, now totally immaterial, for the plaintiff needs only to suggest (as words of form), that he lost such goods, and that the defendant *found them*; and if he proves that the goods are *his property*, and that the defendant had them in his possession, it is sufficient. But a *conversion* must be fully proved, and then, in this action, the plaintiff shall recover damages equal to the *value of the thing converted*, but not the thing itself; which nothing will regain but an action of *detinue* or *replevin* at common law, and under our Virginia statutes, *detinue*, *process of interpleader*, and *forthcoming or delivery bond*. (3 Bl. Com. 152, & n (11); 1 Chit. Pl.

167 & seq; 3 Rob. Pr. (2nd ed.) 441 & seq; *Ante*, p. 356, & seq.)

Lord Mansfield, in *Cooper, &c. v. Chitty, &c.*, 1 Burr. 31, says of the action of *trover*, that "In *form* it is a fiction, in *substance*, a remedy to recover the value of personal chattels wrongfully converted by another to his own use; the form supposes that the defendant may have come lawfully by the possession of the goods," and if he did not, yet by bringing this action the plaintiff waives the trespass. Hence, if the defendant delivers the thing upon demand, no damages can be recovered in this action for having *taken it*. This is an action of tort, and the whole tort consists in the *wrongful conversion*. Two things are necessary to be proved to entitle the plaintiff to recover in this kind of action: 1st, *Property* in the plaintiff; and 2nd, A *wrongful conversion* by the defendant."

The action may be considered with reference, 1stly, To the *thing converted*; 2ndly, The *plaintiff's right* or *property therein*; and 3rdly, The *nature of the injury*, and by whom committed.

1st, *The Property Affected*.

Trover is confined, in its application, to *personal chattels*, and hence does not lie for things annexed *permanently* to the freehold, and constituting *part thereof*; whilst it may be supported for those things which, though fixed to the land, are yet not so fixed but that they continue to be chattels. (1 Chit. Pl. 168; 3 Rob. Pr. (2nd ed.) 443-'4.) It is also maintainable for *specific property* only; and lies not upon a contract to sell and deliver, not certain *identical chattels*, but a given quantity of a particular description of goods. (1 Chit. Pl. 169-'70; 3 Rob. Pr. (2nd ed.) 442.) But if the goods be specific, and of any intrinsic value, the action lies. Thus, in *Grymes v. Shark*, 3 Cro. (Jac.) 262, the action was for *one hundred musk-cats, and sixty monkies*, and upon the plea of *not guilty*, it being found for plaintiff, defendant moved in arrest of judgment, that the action lay not because it was not said that they were *tame or reclaimed*. The motion, however, was overruled, "for they are merchandize and valuable. And so it is of an action for a parrot." And in *Upchard v. Tatam*, 3 Cro. (Jac.) 637, the action of *trover* was allowed for a *bond*, alleged to have been converted by the defendant to his own use. But it cannot be maintained for *money found*, unless it be in a bag or chest, or otherwise be susceptible of identification, not only

in respect to the amount, but in respect also to the *precise pieces*. (*Holiday v. Hicks*, 2 Cro. (Eliz.) 661; S. C. Id. 746; *Hall v. Dean & als*, Id. 841; *Ledesham v. Lerbram*, Id. 870.)

2ndly, *The Plaintiff's Interest*.

In order to support the action of *trover*, the plaintiff, at the time of the conversion, must have had a complete property, either *general* or *special* in the chattel; and also the *actual possession*, or the right to the *immediate possession* of it. (1 Chit. Pl. 170 & seq; 3 Rob. Pr. (2nd ed.) 444 & seq.)

3rdly, *The Nature of the Injury*.

The action of *trover* requires a *conversion* of the chattel to have been accomplished by the defendant himself, or if he be a personal representative, by his testator or intestate; and this conversion may be, (1), By *wrongfully taking* the chattel; (2), By some other *illegal assumption of ownership*; or by *illegally using or misusing* goods; or (3), By a *wrongful detention*. (1 Chit. Pl. 176 & seq; 3 Rob. Pr. (2nd ed.) 452 & seq; *Newsum v. Newsum*, 1 Leigh, 92; 3 Bl. Com. 152, n (11); *Ferrill v. Brewis' Adm'r*, 25 Grat. 765.)

6¹. Action of Trespass *vi et armis*.

The action of trespass *vi et armis* lies to recover damages for the *unlawful taking*, with intermediate consequential injuries. The nature of the injury supposes that it results directly from force applied by the wrong-doer, and, therefore, at common law, trespass alone lay, where the object was to recover indemnity for the *mere taking*, without any subsequent conversion, and trespass on the case was not maintainable. In Virginia however, according to the statute so repeatedly cited, the action of trespass on the case lies wherever the action of trespass may be maintained. (V. C. 1873, c. 145, § 6; 1 Chit. Pl. 191, 193; 3 Rob. Pr. (2nd ed.) 415 & seq.)

7¹. Bill in Equity for a *Writ of Injunction*.

The bill prays, (after stating the grounds of the plaintiff's title), that a writ of injunction may be granted to inhibit the wrong-doer from the unlawful taking he is alleged to contemplate, or if he has taken it, to compel him to restore the chattel. In order to justify the chancellor in intervening thus by injunction, it must appear that, by reason of a *pretium affectionis* or otherwise, the remedy by action at law, through the medium of *damages, &c.*, is *inadequate*, it being that inadequacy of the legal remedy which gives cognizance

to the court of chancery. (Ad. Eq. 194 & seq; 2 Tuck. Com. 457; 2 Rob. Pr. (1st ed.) 225 & seq; Randolph v. Randolph, 3 Munf. 99; Wilson & al v. Butler, 3 Munf. 559; Scott & ux v. Holliday & al, 5 Munf. 103; Bowyer v. Creigh, 3 Rand. 32; Randolph v. Randolph, 6 Rand. 198; Harrison v. Sims, 6 Rand. 506.) Nor, in general, is an injunction to be obtained at all, until the applicant has executed a bond, with good security, conditioned to pay all damages awarded against him in case the injunction be dissolved. (V. C. 1873, c. 175, § 10; Rob. Forms, 388; 2 Rob. Pr. (1st ed.) 239.)

2^h. Injuries to Personal Property in Possession, by *Unlawful Detainer*, and Remedies therefor.

Deprivation of the possession of chattels may be effected, not only by a *wrongful taking*, but also by an unjust *detainer* of another's goods, when the original *taking* was lawful. If I distrain my tenant for arrears of rent, whereupon he immediately tenders me the whole amount claimed, together with the costs of the distress, which I decline; now though the original taking was lawful, my detainment of the goods after tender of full satisfaction of my demand, is wrongful, and in his action against me he can recover no damages for the *caption*, for that was lawful, but only for the *detention*. Or if I lend a man a horse, and he afterwards refuses to restore it, this injury consists in the detaining, and not in the original taking; and the regular method for me to recover possession is by action of detinue, as we shall presently see. (3 Bl. Com. 151 & seq; & n's (9) & (11).)

Remedies for the Unlawful Detainer of Goods; W. C.

1^h. Action of *Detinue*.

The action of detinue lies to recover the specific chattel, if to be had, and if not, its value as assessed by the jury, in the alternative; and in either case, damages for the *unlawful detainer*. (3 Bl. Com. 151-2, & n (11); 1 Chit. Pl. 138 & seq; 3 Rob. Pr. (2nd ed.) 467 & seq; *Ante*, p. 447, & seq.)

The action of *replevin*, it will be remembered, was not even at common law available for unlawful *detainer*, but only where the *taking* is unlawful. (*Ante*, p. 445, &c. But see Wms. Pers. Prop. 51 & seq, n 1.)

2^h. Action of Trespass on the Case in *Trover and Conversion*.

The action of *trover and conversion* has for its object to recover, not the specific chattel, but *its value* in damages as assessed by the jury, having reference to

the time when it was *converted* by the wrong-doer to his own use. (3 Bl. Com. 152, & n (11); 1 Chit. Pl. 167; 8 Rob. 441, *Ante*, p. 451, & seq.)

3^d. Action of Trespass on the Case.

This action which is known as *trespass on the case generally*, proposes to recover the damages which a jury may assess for the *unlawful detention* of the chattel *for a time*; that is, supposing the possession to have been regained. (1 Chit. Pl. 153 & seq; 3 Rob. Pr. (2nd ed.) 426 & seq, 433 & seq.)

4^d. Bill in Chancery, for Writ of Injunction.

The bill in chancery seeks, by means of a writ, or with us *an order of injunction*, to inhibit further detention, and to compel a restoration of the chattel, in those cases where the remedy at law, by reason of the *pretium affectionis* or otherwise, is *inadequate*. (Ad. Eq. 194; *Ante*, p. 453.)

2^d. Wrongs to Personal Property in Possession, *without dispossessing the owner*.

It is obvious that damage may be offered to things personal, while in the possession of the owner, in various ways, as amongst others, by hunting his deer, shooting his dogs, poisoning his cattle, or in anywise taking from the value of any of his chattels, or making them in a worse condition than before. And a little reflection will show that all possible injuries of this kind must of necessity be accomplished in one or the other of two ways, namely, in a manner such that the wrong results either, (1), *Directly from the force* applied by the wrong-doer; or (2), *Indirectly from the force* applied. In both of which cases the party aggrieved shall recover damages in proportion to the injury which he proves that his property has sustained. And it is not material whether the damage be done by the defendant himself or by his servants, by his direction; for the action will lie, in the latter case, as well against the master as the servant. And if a man keeps a dog or other brute animal *used to do mischief*, as by worrying sheep or the like, the owner must answer for the consequences, *if he knows* of such evil habit. (3 Bl. Com. 153.) Thus in *Baxendie v. Sharp*, 2 Salk. 662, the plaintiff having declared that defendant kept a bull that used to run at men, &c., but omitting the *scienter*, it was held naught even after verdict, for the action lies not unless the master *knows of his quality*. In *Smith v. Pelsh*, 2 Stra. 1264, the defendant had notice that his dog had *once* bitten a man, but suffered him still to go about, or lie at his door, where the plaintiff, accidentally treading on his

toes, the dog bit him, and the defendant was held to be liable as having been made aware of the dog's tendencies, or as Lee, C. J. expressed it, "an action will lie against him at the suit of a person who is bit, though it happened by such person's treading on the dog's toes, for it was owing to his *not hanging the dog on the first notice*. And the safety of the king's subjects ought not to be afterwards endangered. The *scienter* is the gist of the action." In *Beck & ux v. Dyson*, Mrs. Beck had been dreadfully bit and lacerated by the defendant's dog, which was proved to be of a fierce and savage disposition, and generally kept by the defendant tied up, but there was no proof of the defendant's knowledge that he was accustomed to bite, unless it could be inferred from the facts above stated, and the further fact that defendant had at one time promised to make her a pecuniary recompense. Lord Ellenborough held the plaintiff's knowledge of the dog's disposition to bite not to be sufficiently proved, and the plaintiffs were nonsuited, (4 Campb. 198.) *Jones v. Perry*, 2 Esp. 482, was considerably antecedent to the last case, and is hardly to be reconciled with it. In that case, the proof of the plaintiff's *scienter*, which Lord Kenyon held to be sufficient, consisted in the fact that the dog had been kept tied up in defendant's cellar, and that a report prevailed in the neighborhood, that the dog had been bitten by a mad-dog. The rope or chain by which he was fastened, was of such length that it suffered him to go to the curb-stone on the *opposite side* of the street, and the dog having gotten into the street, tore the plaintiff's child, who shortly afterwards died of *hydrophobia*. But where the plaintiff is *himself a trespasser*, whatever injury his dog then in his company may do, may be proved as an aggravation of his own trespass, although it were the dog's first offence. (*Vrooman v. Sawyer*, 13 Johns (N. Y.) 339; *Beckwith v. Shordike & al*, 4 Burr. 2092; *Michael v. Alestree*, 2 Lev. 172; Com. Dig. Action upon the case for negligence, (A 5); *Id.* Pleader, (2 P 2); 1 Chit. Pl. 94, 209.)

It may be observed that, if a man sets traps in his own grounds, but baited with such strong scented articles as allure the neighboring dogs from the premises of the owners, or from the highway, the owner of a dog injured may maintain an action therefor. (3 Bl. Com. 153 n (13).) *Remedies for Wrongs done to Property in Chattels*, without *Dispossessing the Owner*; W. C.

1^h. Remedy where the Wrong *results directly* from force applied.

The proper action at common law is trespass *vi et armis*. In Virginia it may be either trespass *vi et armis*, or trespass on the case. (V. C. 1873, c. 145, § 6); the redress being afforded in either case by such damages as a jury shall estimate to afford adequate amends. (1 Chit. Pl. 198; 3 Bl. Com. 153; 3 Rob. Pr. (2nd ed.) 426, 433.)

- 2^b. Remedy where the Injury results *only consequentially*, and *not directly* from the force applied by the wrongdoer.

The proper action in this case, at common law, and in Virginia, is trespass on the case for damages. (3 Bl. Com. 153; 1 Chit. Pl. 153; 3 Rob. Pr. (2nd ed.) 426, 433 & seq.)

- 2^f. Wrongs done to Personal Property *in Action*.

Hitherto we have been engaged with the contemplation of injuries affecting the rights of things personal *in possession*. We are next to consider those which regard things *in action* only; that is, such rights as are founded on and arise from *contracts*, the nature of which has been heretofore briefly explained (*Ante*, p. 15, &c.), and may be found more largely set forth 2 Bl. Com. 442 & seq. The violation or non-performance of these contracts might be extended into a great variety of wrongs, but it will be quite sufficient for the present purpose to adopt a two-fold division of contracts, viz: contracts *express*, and contracts *implied*; and to point out the injuries that arise from the violation of each, with their respective remedies. (3 Bl. 153);

W. C.

- 1^a. Wrongs by Breach of *Contracts Express*.

Express contracts may be very fitly distributed into contracts *to pay money*, and contracts *to do a collateral thing* (3 Bl. Com. 353, *Ante*, p. 17, & seq);

W. C.

- 1^b. Wrongs by *Non-payment of Debts*.

The legal acceptance of a *debt* is a sum of money due by certain agreement, either *express* or *implied*, whereby the amount to be paid is ascertained, or at least, the materials are supplied for ascertaining it, as in case of a bond, a promissory note, a rent reserved on a lease, a sale of goods, the doing of work, &c. The non-payment of any debt is an injury to personal property *in action* (*choses* or things *in action*, as such property is called), and the shortest and most usual remedy therefor (but by no means the sole remedy), is by action of *debt*, to compel the performance of the promise, and recover the specific sum due. The idea once

prevailed (which also is countenanced by Blackstone), that in order to constitute a debt proper, the promise must be *express*, and must relate so precisely to a determinate sum that not only can neither less nor more be recovered, but that, unless the proof establishes the *exact sum* claimed, the plaintiff fails to recover anything. This narrow view, however, is quite superseded by the more convenient as well as more logical one above stated. (3 Bl. Com. 154; 1 Chit. Pl. 123, 128; 3 Rob. Pr. (2nd ed.) 370 & seq.)

Remedies for Wrongs by Non-Payment of Debts; W. C. 1st. Action of Debt.

The action of debt is designed to recover a *specific sum of money due by contract*, verbal or written, express or implied, where the amount is either ascertained, or from the *nature of the demand* is capable of being ascertained, whether due on legal liabilities (as penalties denounced by statute), on simple contracts, on specialties, (or obligations *under seal*), on records (as recognizances, judgments, &c.), or otherwise. (3 Bl. Com. 154, 155; 1 Chit. Pl. 123 & seq; 3 Rob. Pr. (2nd ed.) 370 & seq.)

Some doubt exists at common law as to whether an action of debt lies against an endorser of a negotiable security or the *drawer of a bill* of exchange, upon the ground that the liability is not ascertained merely by the writing, but depends also upon the manner in which the holder has proceeded with it in duly presenting it and giving due notice of dishonor. And so, also, debt was held not to lie upon any unsealed *note in writing* for the payment of money, but only upon the *contract witnessed by the note*, averring and proving a valuable consideration. (1 Chit. Pl. 128-'9; Bishop v. Young, 2 Bos. & P. 81 & seq; Com. Dig. Debt, (B).) But in Virginia all doubt is removed by statute (V. C. 1873, c. 141, § 10, 11), which declares that an action of debt may be maintained upon any note or writing, by which there is a promise, &c. to pay money, if the same be signed by the party to be charged, or his agent; and also that upon any negotiable note payable at a bank or savings bank, *in or out of this State*, and upon any bill of exchange, if the *same be protested*, an action of *debt* may be maintained *jointly* against all liable by virtue thereof, whether *drawers, endorsers or acceptors*, or against *one or any immediate number* of them for the principal, and charges of protest, with interest thereon from the date of the protest, and in the case of the bill for damages also.

Debt it seems, lies not for a debt payable *by instalments* and not secured by penalty, *until all are due*—a doctrine for which no satisfactory reason can be given, and which is in direct conflict with an early case, (*March v. Freeman*, 3 Lev. 388,) but which is too well established by authority to be disregarded. (1 Chit. Pl. 128-'9; *Rudder v. Price*, 1 H. Bl. 554-'5; *Paul v. Dod, &c.*, 2 Man. Gr. & Scott, (52 E. C. L.) 800; *Ambergate R. R. Co. v. Coulthard*, 5 Excheq., 459; *Birkenhead R. R. Co. v. Webster*, 6 Id. 277; *Coates v. Hewitt*, 1 Wils. 80; *Judd v. Evans*, 6 T. R. 399; 3 Rob. Pr. (2nd ed.) 358, 360 to 362; *Peyton v. Harman*, 22 Grat. 647);

W. C.

1^k. Promise to pay Money *eo numero*.

Debt *always lies* upon a promise to pay an ascertained sum of money, whether the promise be under seal or not, and whether it be express or implied; but it will be observed that where the promise is *not under seal*, the action at common law should be *on the promise*, averring and proving a valuable consideration, and not *on the writing*, if there be one. The latter is allowed by the statute above referred to. (V. C. 1873, c. 142, § 10). See 1 Chit. Pl. 123 &c.

2^k. Promise to Deliver a Chattel *not Money*.

e. g. One hundred barrels of flour; one hundred ounces of gold, &c. Upon such a promise *debt lies not*. (*Beirne v. Dunlap*, 8 Leigh, 515-'6, 518; *Butcher v. Carlyle*, 12 Grat. 520; *Dungan v. Henderlite*, 21 Grat. 149; *Watson v. McNairy*, 1 Bibb. (Ky.) 356; *Bruner v. Kelsoe*, 1 Bibb. 487; *Mallox v. Craig*, 2 Bibb. 584; Com. Dig. Debt, (B).)

3^k. Promise to pay a named Sum *in chattels*, (*e. g.*, \$1,000 in wheat.)

When default is made the election to pay in the collateral commodity is gone, and it is a *money debt*, for which the *action of debt* lies. (2 Rob. Pr. (2nd ed.) 57-'8; 3 Id. 373-'4; *Beirne v. Dunlap*, 8 Leigh, 514; *Butcher v. Carlyle*, 12 Grat. 525; *Dearing's Adm'r v. Rucker*, 18 Grat. 438; *Dungan v. Henderlite*, 21 Grat. 150 & seq.)

4^k. Promise to deliver a *quantity* of a commodity designated *by dollars*, (*e. g.*, \$1,000 in *National Bank Notes*.)

This is construed to be a promise *to deliver a quantity*, not to *pay a value*, and so debt lies not, but covenant or trespass on the case in assumpsit, according as the promise *is or is not under seal*. (*Beirne*

v. Dunlap, 8 Leigh, 514; Butcher v. Carlyle, 12 Grat. 520; Dearing v. Rucker, 18 Grat. 438; Dungan v. Henderlite, 21 Grat. 150 &c.)

2^d. Action of Trespass on the Case in *Assumpsit*.

The action of assumpsit lies to recover damages for the breach of a promise to pay money, when the promise is *not under seal*; the damages in modern times being always *the debt due, with interest*. (3 Bl. Com. 157; 1 Chit. Pl. 113, 116, &c.; *Ante*, p. 348.)

3^d. Action of Covenant.

The action of covenant lies to recover damages for breach of a promise to pay money, when the promise is *under seal*, which damages in modern times are always, in practice, *the debt due, with interest*. (3 Bl. Com. 156-'7; 1 Chit. Pl. 134, &c.; *Ante*, p. 345, &c.)

4^d. Action of Account.

The action of account is designed in order to *settle mutual accounts*, where some privity exists between the parties, and to recover the balance ascertained to be due. (Bac. Abr. Assumpsit; 3 Rob. Pr. (2nd ed.) 410, &c.; *Ante*, p. 346, &c.)

5^d. Bill in Equity.

A bill in equity is the modern substitute for an action of account, and, like that action, it is appropriate only where the *accounts are mutual*, there being demands on both sides; but, unlike the action of account, it requires *no privity* between the parties. So a bill in equity also lies where it is necessary, for any reason, to invoke the jurisdiction of the court in order to do justice between the parties, as in order to settle and adjust an account between them, which a court of chancery, with its *master commissioner*, is able to do with much more facility and efficiency than a court of law with its *auditors*. (1 Rob. Pr. (1st ed.) 76; 2 Id. 3, 4, 128, 359, &c.; 1 Stor. Equity, § 442 & seq; Ad. Eq. 418, &c.)

2^b. Wrongs by Non-Performance of *Collateral Agreements*; W. C.

1^d. Non-Performance of *Collateral Agreements under Seal*.

Remedies :

1^a. Action of Covenant.

The action of covenant is the proper remedy upon all collateral agreements under seal, in order to *recover damages* to compensate for the breach of the agreement. (3 Bl. Com. 156; 1 Chit. Pl. 131, 134, &c.; 3 Rob. Pr. (2nd ed.) 362 & seq; *Ante*, p. 345, &c.)

A covenant real to *convey lands* admits of a remedy (not in use in Virginia, nor in modern times it seems in England, except in *cases of fines*), by writ of covenant for the *specific performance* of the contract, which is now practically to be sought *in equity alone*. (3 Bl. Com. 156; Ad. Eq. 77; 2 Stor. Eq. § 715 & seq.)

2^k. Bill in Chancery.

A bill in chancery must be resorted to in order to enforce the *specific performance* of contracts, according to their terms, in those cases where damages constitute an *inadequate satisfaction*; *e. g.*, contracts to buy or sell lands. (Ad. Eq. 77 & seq.; 2 Stor. Eq. § 712 & seq.; 1 Id. § 30.)

2^l. Non-Performance of *Collateral Agreements not under Seal*.

Remedies.

1^k. Action of Trespass on the Case *in Assumpsit*.

As the action of covenant lies to recover damages for the breach of a collateral contract *under seal*, so trespass on the case in assumpsit is the proper remedy in order to *recover damages* to compensate for the breach of an agreement *not under seal*. (3 Bl. Com. 157, &c.; 1 Chit. Pl. 112-'13; 3 Rob. Pr. (2nd ed.) 390; *Ante*, p. 346, & seq.)

2^k. Bill in Equity.

By means of a bill in equity one may compel the *specific performance* of a contract not under seal, where damages constitute an *inadequate satisfaction*, *e. g.* contracts to *buy or sell lands*. (Ad. Eq. 77 & seq.; 1 Stor. Eq. § 30; 2 Id. § 712, &c.)

2^g. Wrongs by Breach of Contracts *Implied*. (3 Bl. Com. 158 & seq); W. C.

1^h. Contracts Implied from the *Nature and Constitution of Government*.

e. g. To pay the pecuniary penalties imposed for the infraction of the laws. (3 Bl. Com. 158.)

Remedies.

1ⁱ. Action of Debt.

The action of debt lies in this case in order to recover the penalty denounced by the law *eo numero*, upon the ground of the implied promise which the law derives from the liability. (3 Bl. Com. 158-'9; 1 Chit. Pl. 128; Id. 404, &c.; 3 Rob. Pr. (2nd ed.) 382, &c.)

The informer at common law sues for the penalty on the king's behalf as well as his own, and in his *declaration* or complaint he describes himself as

one "*qui tam queritur pro rege, quam pro se ipso*;" and hence the action is often called a *qui tam*, and sometimes a *popular* action. (3 Bl. Com. 160.)

In Virginia the proceedings may be in similar form, but it may also be *in the name of the commonwealth*, and may be by action of debt, or action on the case, or by motion. (V. C. 1873, c. 40, § 1, 2.)

2^d. Action of Trespass on the Case in *Assumpsit*.

Assumpsit lies upon the implied promise to pay, in order to recover the penalty prescribed, in the shape of damages for failing to pay it, according to the *implied promise* of the defendant. (1 Chit. Pl. 173-'4; 3 Rob. Pr. (2nd ed.) 391; *Ante*, p. 346, &c.)

2^h. Contracts Implied from the *Reason and Construction of Law*.

e. g. To pay for goods sold, work done, &c., where there is no express promise. (3 Bl. Com. 161.)

Remedies.

1st. Action of Debt.

The action of debt may be here maintained in order to recover as a sum ascertained, or in its nature capable of being ascertained, and as *impliedly promised*, the value of the work done, goods sold, or the benefit otherwise received. (1 Chit. Pl. 129; *Ante*, p. 458, &c.)

2^d. Action of Trespass on the Case in *Assumpsit*.

The party complaining may in an action of assumpsit recover damages for breach of the implied promise to pay the value of the work done, goods sold, &c., the amount of such damages being the value of the work, &c., with interest from the date when it should have been paid. (3 Bl. Com. 161-'2; 1 Chit. Pl. 112-'13; *Ante*, p. 346.)

3^d. Action of Account.

The action of account is appropriate where there are *mutual demands* depending on an implied promise to settle and pay, &c., supposing that there also is between the parties a *privity* in fact or in law, such as exists between principal and receiver, &c. (3 Rob. Pr. (2nd ed.) 410, &c.; *Ante*, p. 346, &c.)

4th. Bill in Equity.

As a bill in equity lies for an *account* where there are *mutual demands* founded on express promises, so it is also a proper remedy when the promises are implied. (Ad. Eq. 222, &c.; 1 Stor. Eq. § 442 & seq.)

2^o. Injuries to Rights relating to *Real Property*.

The injuries to rights relating to real property are the following, viz: (1), Ouster, or dispossession; (2), Trespass;

(3), Nuisance; (4), Waste; (5), Subtraction; and (6), Disturbance;

W. C.

1^f. Wrongs by *Ouster or Dispossession*; W. C.

Wrongs by ouster or dispossession may be, (1), By ouster from *freehold* estates; and (2), Ouster from *terms for years*;

W. C.

1^a. Ouster from *Freehold Estates*; W. C.

1^h. Abatement.

Which is a wrongful entry *after the ancestor's death*, and before the heir can enter. (3 Bl. Com. 167.)

2^h. Intrusion.

Which is a wrongful entry after the determination of a particular estate, say *for life*, and before the freehold remainderman or reversioner can enter. (3 Bl. Com. 168.)

3^h. Disseisin.

Disseisin is the wrongful and direct dispossession of the *tenant of the freehold*. (3 Bl. Com. 168.)

4^h. Discontinuance.

Discontinuance is where a tenant in tail conveys the land in *fee-simple*, by *feoffment with livery*, and *dies*. The estate-tail is *discontinued*. So, at common law, feoffment with livery of seisin by husband, seized in right of his wife, works a discontinuance of her estate. *Aliter* in Virginia it being provided by statute, that the conveyance shall pass only as much as the grantor *may lawfully pass*. (V. C. 1873, c. 112, § 7.)

5^h. Deforcement.

Deforcement is any wrongful privation of the possession of the *freehold*, which is not included in any of the foregoing modes of ouster; *e. g.* the withholding of a widow's dower by one whose duty it is to assign it to her; the alienation of an infant or non-sane person when the alienee enters and holds possession, &c. (3 Bl. Com. 172 to 174.)

Remedies for Ouster from the Freehold.

1ⁱ. Peaceable Entry on the Lands.

This remedy by peaceable entry is applicable only in case of ouster by *abatement*, *intrusion*, or *disseisin*; and not in case of *discontinuance* or *deforcement*, where the original entry of the wrong-doer, being lawful, and thereby an apparent right of possession being gained, the law will not suffer that right to be overthrown by the *mere entry* of the claimant, but the latter is driven to his action. Yet a man may enter on his tenant *by sufferance*; for such tenant has no freehold, but only

a bare possession, which may be defeated like a tenancy at will, by the mere entry of the owner; but the owner, if he thinks it expedient, may suppose such tenant to have gained a tortious freehold, and bring his action accordingly. (3 Bl. Com. 174-'5-'6.)

It is not out of place to mention here two cases of entry provided for in Virginia by statute, where otherwise there could be no entry, namely: (1), Where the tenant *deserts the premises*; and (2), Where a *city tenant makes default in the payment of rent*. Thus it is enacted: (1), That when a *tenant deserts the demised premises*, and leaves them uncultivated and unoccupied, without goods thereon subject to distress sufficient to pay the rent due, the lessor, after a month's notice, in writing, posted on a conspicuous part of the premises, may enter and put an end to the tenancy. (V. C. 1873, c. 134, § 6); and (2), Where a *tenant in a city or town* continues in default *five days* after notice *in writing*, requiring possession or payment, such tenant forfeits his right to the possession, and the lessor may thereafter, at his option, deem the tenant's possession unlawful, and may have a writ of unlawful detainer therefor, and doubtless might enter also. (V. C. 1873, c. 130, § 4.)

Let us now advert, as incident to the entry on lands, to (1), The doctrine of continual claim; and (2), The doctrine of descent tolling entry;

W. C.

1^k. Continual Claim.

Where the claimant is deterred from entering by menaces or bodily fear, the common law allows him to *make claim* as near to the estate as he can, with the like forms and ceremonies; which claim is in force for only *a year and a day*. And this claim, if it be repeated once in the space of every year and a day, (which is called *continual claim*,) has the same effect with, and in all respects amounts to a *legal entry*. (3 Bl. Com. 175.)

But in Virginia, it is enacted by statute, that *no continual or other claim* upon or near any land, shall preserve a right of entry or of action. (V. C. 1873, c. 145, § 3.)

2^k. Descent tolling (taking away) Entry.

In case, where entry is otherwise lawful, it may be by the common law, *toll*ed (from *tollere*), or *taken away by descent* of the wrong-doer's title, such as it is, *upon his heir*. For this doctrine of the common law, several reasons are given, all of which belong to

a rude state of society and an imperfect administration of the law, and one of the most potent grows directly out of the system of feuds, or military land holdings.

The reasons are stated thus :

(1), Because as the heir comes to his estate by act of the law, and not by his own act, the law protects his title, and will not suffer it to be divested, till the claimant has proved a better title.

(2), Because the heir may not know the true state of his title, and therefore the law, ever indulgent to heirs, takes away the entry of the claimant who neglected to enter on the ancestor in his life-time, and puts him to his action.

(3), Because such a policy tended to make the feudatory *bold in war*, since his children could not by the *mere entry* of another be dispossessed of the lands whereof he died seised. (3 Bl. Com. 176 ; 2 Insts. Com. & Stat. Law, 448.)

This doctrine of *descent tolling entry* was materially modified by Stat. 32 Hen. VIII, c. 33, which enacts that no descent to the disseisor's heir shall take away the entry of him who has the right to the land, unless the disseisor had peaceable possession *five years* next after the disseisin, (3 Bl. Com. 177,) which was also the law of Virginia until 1850. But by the revival of 1849, it is enacted that entry shall *not be tolled nor defeated by descent cast*. (V. C. 1873, c. 129, § 4.)

This remedy by entry is barred by the statute of limitations, after the lapse of *fifteen years east*, and *ten years west* of the Alleghany mountains, reckoning from the time the right to make the entry accrued; and saving to infants, married women, and insane persons, *ten years* after their said disabilities ceased, or their death, whichever shall first have happened, but in no case to *exceed thirty years* after the right accrued. (V. C. 1873, c. 146, § 1, 3, 4, 5.)

Whilst speaking of entry upon lands, as a remedy for dispossession, it will not be amiss to call the student's attention to certain statutory provisions in Virginia, taken for the most part from New York statutes, touching the remedy by re-entry, &c., in case of lessees who have omitted to pay their rent, or who have broken any covenant or condition, where the lessor has a right of re-entry therefor. The lessor, without actually entering, may bring an action of ejectment for the land, allowing the lessee a year

to redeem it the forfeiture. And where an actual re-entry is made, (which may be done through a sheriff or other officer,) the act of re-entry, authenticated by the oath of the officer, is to be recorded in the "deed-book," by the clerk of the county or corporation where the land lies, and a certified copy thereof is legal evidence of the facts set forth therein. (V. C. 1873, c. 134, § 16 to 24.)

2^d. Real Actions.

Real actions are, (1), Possessory ; and (2), Droiturel. W. C.

1st. Possessory Actions.

Possessory actions, whose general character has been already defined, (*Ante*, p. 340,) embraces, (1), The writ of forcible entry, &c.; (2), The writ of entry; and (3), The writ of assize; W. C.

1st. Writ of Forcible Entry, &c.

This proceeding, which is *statutory* and not common law, is made applicable where there has been made upon land *a forcible*, or an *unlawful entry*; or where, when the entry is lawful and peaceable, the tenant shall *detain the possession* of land after his right has expired, without the consent of him who is entitled to the possession, supposing the proceeding to be instituted within *three years* after the entry or detainer. (V. C. 1873, c. 130, § 1; *Ante*, p. 340.)

The proceeding is known as a writ of *forcible entry*, or of *unlawful entry*, or of *unlawful detainer*, according to the character of the complaint, as for one or the other of these wrongs. It is usually prosecuted in a court of record, the circuit, county, or corporation court; but where the possession is unlawfully detained by a tenant whose lease was originally for a period *not exceeding one month*, the person entitled to the possession may proceed before a justice of the peace, with an appeal to the county or corporation court. (V. C. 1873, c. 130, § 1 to 3, 5.)

It seems plain, from the tenor of the statute, that in case of *forcible or unlawful entries*, the plaintiff has only to show a *right to the possession* at the time of the issuing of the summons to entitle him to recover, whether the title he depends on be *legal or equitable*. Whether the same is the case when he complains of an *unlawful detainer* is not clear, but as the proceeding, even in case of *unlaw-*

ful detainer, involves *no question of title*, but only whether the plaintiff is entitled to the possession as against the defendant. (*Allen v. Gibson*, 4 Rand. 477.) It seems more consonant to analogy to consider that in that case also the proceeding may be founded on an *equitable title*, accompanied by a right to the possession. (*Olinger v. Shepherd*, 12 Grat. 471, 476; *Corbet v. Nutt*, 18 Grat. 648; *Power & al v. Tazewells*, 25 Grat. 784. But see *Harrison v. Middleton*, 11 Grat. 548-'9; *Dobson v. Culpeper & ux*, 23 Grat. 363.)

The issue submitted to the jury is, whether within the period of limitation, namely, *three years*, the plaintiff was forcibly or unlawfully *turned out of the possession*, or whether it was *unlawfully detained* from him. (V. C. 1873, c. 130, § 3; *Ante*, p. 464.)

2¹. Writ of Entry.

This remedy proposes to disprove the title of the tenant or possessor by showing the unlawful means whereby he entered or continues in possession. (3 Bl. Com. 180 & seq.)

The action is applicable to all the cases of *ouster* before mentioned, except that of *discontinuance*, and some species of *deforcement*, *e. g.* withholding from a widow her dower after her husband's death. And indeed, in early times, the writ of entry was the most common possessory action for the recovery of lands in all cases, and was in England usually brought in the *county court*, which was held *every three weeks*, so that the remedy was a very prompt one. But when, after the Conquest, these causes were drawn into the king's courts, the delays became so intolerable that a speedier redress by *writ of assize* was devised. (3 Bl. Com. 182 to 184; *Ante*, p. 341-'2.) The writ of entry is abolished in Virginia. (V. C. 1873, c. 131, § 38.)

3¹. Writ of Assize.

This writ is said to have been invented by Glensvil, chief-justice to Hen. II; and if so it is supposed to have been introduced by a statute of 22 Hen. II, which is not extant. It is styled by the statute 13 Edw. I, c. 24, *festinum remedium*, a speedy remedy, in comparison with the writ of entry, not admitting of the dilatory pleas and proceedings to which that and other real actions were liable. (3 Bl. Com. 184; *Ante*, p. 341, & seq.)

As the *writ of entry* proposes to disprove the title of the occupant by showing the unlawful cour-

mencement of his possession; so an *assize* is designed to prove the title of the demandant merely by showing his or his ancestor's possession. The word *assize* (from the latin *assidere*—to sit together,) signified originally the jury who tried the cause, and who *sat together* for that purpose. By a figure, it has since been made to signify the court or jurisdiction which convenes the jury for the trial of causes; and hence the judicial assemblies held in England by the king's commission in every county, as well to take these writs of assize, as to try causes at *nisi prius*, and to administer justice in criminal cases, are termed in common speech, *the assizes*. And by a somewhat similar figure, the name of *assize* is also applied to this action, for recovering possession of lands, because in these writs the sheriff is ordered to summon a jury or assize; which is not expressed in any other original writ. (3 Bl. Com. 185.)

The remedy by *writ of assize* is applicable to but two species of injury by *ouster*, namely, *abatement*, and a recent or *novel disseisin*. If the complaint is of an ouster by *abatement*, the writ is styled a *writ of assize of mort d'ancestor*, of *besayle*, of *tresayle*, or of *cosinage*, according as the ancestor on whose possession the demandant relies is more or less remote. If it is by *disseisin* of the demandant himself, it is called a *writ of assize of novel (recent) disseisin*. In these possessory actions there is a time of limitation settled by the statute of limitations, beyond which no *possessory action* is maintainable, but the claimant is put to his more final remedy of a *droiturel action* founded on the *mere right of property*. In Virginia, however, there is but one period of limitation (besides that of *three years* to writs of *forcible entry*, &c.,) to entries on and actions for lands, which is that above stated, of *fifteen years east*, and *ten years west* of the Alleghany mountains. (*Ante*, p. 465; 3 Bl. Com. 188, &c.)

The writ of assize is not used in practice in Virginia; but it is available, at all events in cases of *novel disseisin*, just as in England. (V. C. c. 15, § 2.)

2*. Droiturel Actions.

Droiturel actions are real actions founded on the *mere right of property*, where the *right of possession*, both *actual and apparent*, is lost, either by lapse of time or by the unsuccessful issue of a *possessory action*. (3 Bl. Com. 177, 190-'91; *Ante*, p. 342, &c.)

The more usual ones, at common law, are (1), The writ of *quod ei deforceat*; (2), The writ of *right of dower*; (3), The writ of *formedon*; and (4), The writ of *Right*;
W. C.

1¹. Writ of *Quod ei Deforceat*.

The writ of *quod ei deforceat* is applicable where the owner of an estate *for life or in fee-tail* suffers judgment *by default* in a possessory action. It is given by the statute 13 Edw. I, c. 4, and, therefore, is reserved in Virginia, though not used in practice. (3 Bl. Com. 193; V. C. 1873, c. 15, § 2; *Ante*, p. 342, &c.)

2¹. Writ of *Right of Dower*.

The object of the *writ of right of dower*, is to recover a widow's dower, when a part of it has been already assigned to her *in the same tract*. (3 Bl. Com. 183; *Ante*, p. 343.)

As the writ partakes of the nature of a *writ of right*, which has been abolished in Virginia, (V. C. 1873, c. 135, § 38,) it may perhaps be questioned whether this action also is not to be considered as abolished with us. The doubt, however, is not likely speedily to receive a judicial solution, dower having been now for more than a century recoverable, both in England and with us, by the much more convenient method of a bill in chancery, and our recent statutes permitting it to be recovered by an action of *ejectment* also, (1 Stor. Eq. § 624 & seq; V. C. 1873, c. 106, § 10.)

3¹. Writ of *Formedon*.

The writ of *formedon* is granted by statute 13 Edw. I, c. 1, as a necessary incident of *estates-tail*, which originated in the statute contained in the same chapter. It is applicable where the estate-tail is *discontinued*, and the remainder or reversion dependent thereon is displaced, and turned to a *mere right*, by a feoffment in fee-simple, with livery of seisin, made by the tenant in tail. The writ is distinguished into three species, according as it is employed to redress the injury done to the *issue in tail*, the *remainderman*, or the *reversioner*, respectively, namely, a *formedon* in the *descender*, in the *remainder*, and in the *reverter*. (3 Bl. Com. 191-2; *Ante*, p. 344, &c.)

This writ, also, like the possessory writs, is subject to limitation in England by the statute of limitations.

In Virginia, the writ of *formedon* ceased to have any real application in general practice, from the time of the abolition of *estates-tail*, (Oct. 7, 1776); but it continued to be recognized by the statutes, (e. g. the statute of limitations), until the revisal of 1849 abolished it, and previous to that time was in one case actually employed in order to assert a claim to an estate-tail which was supposed to be unaffected by the statute of 1776. (*Orndoff v. Turman*, 2 Leigh, 200, 220, &c.; V. C. 1873, c. 131, § 38; *Ante*, p. 344.)

4¹. Writ of Right.

The writ of right at common law, is appropriate to recover an estate in *fee-simple*, and lies not for one claiming a *less estate*. It lies concurrently with all other real actions to recover a fee-simple, and it also lies *after them*, being an appeal to the *mere right*, when judgment has been had as to the *possession*, in an inferior possessory action. (3 Bl. 193-'4; *Ante*, p. 344.)

It was much simplified by statute formerly in Virginia, and all the sources of delay removed from it; and in the counties west of the Blue Ridge had become a favorite action for the recovery of lands; but by the revisal of 1849 the writ is *abolished*, and substituted in all cases by the *action of ejectment*. (V. C. 1873, c. 131, § 38, 1, 2.)

3¹. Mixed Actions.

The purpose of *mixed actions* is to recover at once *lands and damages*. The mixed actions now to be mentioned are, (1), The action of ejectment; (2), The writ of waste; and (3), The writ of dower, *unde nihil habet*;
W. C.

1². Action of Ejectment.

The nature of the action of ejectment, with its origin and history, have been already fully described, and to that passage reference is made as if it were *here repeated*. See 3 Bl. Com. 199 & seq; Steph. Pl. 11, 32; V. C. 1873, c. 131, § 1, &c.; *Ante*, p. 358, & seq.

In respect to the *mesne profits* in an action of ejectment, see *Purcell & ux v. Wilson*, 4 Grat. 16; *Chinn v. Murray*, Id. 348; *Goodwyn v. Myers*, 16 Do. 336; and as to *defences* in the action see V. C. 1873, c. 131, § 20 to 22; *Atkins v. Lewis*, 14 Grat. 30; *Miller v. Williams*, 15 Id. 213; *J. R. & K. Co. v. Robinson*, 16 Grat. 434; *Blankenpickler v. Ander-*

son, Id. 59; Mitchell v. Baratta, 17 Id. 445; Williamson v. Paxton, 18 Id. 475.

2^k. Writ of Waste.

The object and history of this action likewise have been previously explained, to which the student is advised now to refer. See 3 Bl. Com. 222; 2 Insts. Com. & Stat. Law, 628 & seq; *Ante*, p. 364, & seq.

As by our statute in Virginia the *place wasted is not recovered*, but only damages, it may perhaps be that the action of waste is to be considered as amongst us abolished, (V. C. 1873, c. 137, § 1, 4); or at all events, if it exist, it must be merely as a *personal*, and not as a mixed action. See Dejarrette v. Allen & ux, 5 Grat. 499; 2 Insts. Com. & Stat. Law, 631; *Ante*, p. 365.

3^k. Writ of Dower, *unde nihil habet*.

This writ of dower *unde nihil habet* is designed to recover a widow's dower of the ancestor's heir, or of whatever other person, being in possession of the *freehold*, is obliged by law to assign it, together with damages for the detention where the husband *died seised*, supposing *no part of her dower* in the *same tract* has already been laid off to her. If the husband does *not died seised*, because he sold the land, or was wrongfully evicted of it in his life-time, the widow recovers damages from the time of the *commencement of her suit*, nor in any case can she, with us, recover for more than *five years* before the commencement of the action. (3 Bl. Com. 183; Steph. Pl. 10; V. C. 1873, c. 106, § 11.)

Dower is, however, usually recovered by *bill in equity*, although by statute in Virginia the action of ejectment lies for it. (1 Stor. Eq. § 624, &c.; V. C. 1873, c. 106, § 10.)

2^l. Ouster from *Chattels Real*; i. e., *Terms for Years*.
Remedies for Ouster from Chattels Real.

1^h. Writ of Forcible Entry, &c.

See V. C. 1873, c. 130, § 1 to 4, 5.

2^h. Action of Ejectment.

See V. C. 1873, c. 131, § 1, &c.

2^f. Injuries by *Trespass on Land*.

Trespass is an entry on another's ground without lawful authority, by oneself, one's servants, or one's cattle, and doing some damage, however inconsiderable, (though it be only to tread down the grass,) to his real property. (3 Bl. Com. 209.) Trespass being an injury to the *possession*, the action to redress it can only be maintained by one who, or whose tenant, is in the occupancy of the

lands. (Kretzer v. Wysong, 5 Grat. 10; 3 Rob. Pr. (2nd ed.) 414 & seq; 2 Do. 636.)

Remedies for Trespass on Lands.

1st. Action of Trespass *vi et armis, quare clausum fregit*.

See Bl. Com. 308 & seq; 3 Rob. Pr. (2nd ed.) 414; Id. 420; Id. 426 & seq.

Damages are in this action recovered, such as a jury shall think commensurate with the injury done. (Jordan v. Wyatt, 4 Grat. 151; Kretzer v. Wysong, 5 Grat. 9; Beach v. Trudgain, 2 Grat. 219; Bailey v. Butcher, 6 Grat. 144.)

2nd. Action of *Trespass on the Case*.

This action seldom lies at common law, for a trespass on lands, for such an injury is almost of necessity accompanied *by force*, from which the injury *directly results*. In Virginia, however, it will be remembered, that trespass on the case lies wherever trespass *vi et armis* can be maintained. (V. C. 1873, c. 145, § 6; Jordan v. Wyatt, 4 Grat. 151; 3 Rob. Pr. (2nd ed.) 427.)

3rd. Bill in Chancery for an Injunction.

This remedy lies where the trespass is attended with *permanent injury* to the freehold or inheritance. In that event damages would be an inadequate redress, and therefore a court of equity, upon its principle of supplying a remedy where the legal one is essentially defective, will interfere to *prevent* the trespass, or a repetition of it, and as incident thereto will oblige the wrong-doer to give an account of the mischief already done, and to pay the sum assessed. (Ad. Eq. 210; 2 Stor. Eq. § 928, &c.)

3^d. Injuries occasioned *by a Nuisance*.

A nuisance to lands is anything done to the injury of the lands, tenements, or hereditaments of another, or to the annoyance of the owner in respect to the enjoyment thereof. (3 Bl. Com. 215, &c.; Bouv. Law Dict. Nuisance.)

Remedies for Nuisance; W. C.

1st. Trespass *vi et armis*.

This action lies wherever the injury *results directly* from the force applied by the wrong-doer. (1 Chit. Pl. 159-'60; 3 Rob. Pr. (2nd ed.), 426 & seq.) It recovers damages such as a jury shall think will compensate the injury; but more commonly the action for redress for a nuisance is trespass *on the case*.

2nd. Action of Trespass on the Case.

Trespass on the case lies at common law wherever the injury does *not result directly* from force applied by the wrong-doer. In Virginia it lies wherever trespass *vi et armis* can be maintained, as well as in the cases where it

lay at common law. (V. C. 1873, c. 146, § 6; 1 Chit. Pl. 159-'60; 2 Rob. Pr. (2nd ed.) 426 & seq.)

3^s Assize of Nuisance.

This action has the two-fold function of removing the nuisance and recovering damages. (3 Bl. Com. 220, 221.)

The action can only be brought by a *tenant of the freehold*. (3 Bl. Com. 220.)

For a *public* nuisance no private action lies, unless the party complaining is *especially injured* thereby. (3 Bl. Com. 219-'20; Penn. v. Wheeling Br. Co. 13 How. 578; Miss. & Mo. R. R. Co. v. Ward. 2 Black, 485; Synops. Crim. Law, 180, 181.)

4^s Writ of *Quod Permittat Prostertere*.

The writ of *quod permittat prostertere* has for its object to remove the nuisance, and to recover damages therefor. It is applicable only in favor of a *tenant of the freehold*. (3 Bl. Com. 221-'2.)

5^s Bill in Chancery for an Injunction.

A bill in chancery is maintained generally, in case of nuisances, because, for the most part, they are liable to produce *irremediable injury*, for which damages will afford no adequate compensation, so that the injury must be *prevented*. (Ad. Eq. 210; 2 Stor. Eq. § 917, &c.; Id. § 925 & seq; Penn. v. Wheeling Br. Co. 13 How. 518; Miss. & Mo. R. R. Co. v. Ward, 2 Black, 485.)

4^t Waste.

Waste is a *permanent injury* to the inheritance in land, such as is not brought about by the direct act of God, or a *public enemy*. It is either *voluntary* or *permissive*, and when not taken notice of by the courts of common law, is known as *equitable*. (1 Bl. Com. 223-'4; 2 Insts. Com. & Stat. Law, 591 & seq.)

As to *persons* who may commit waste, it is obvious that no *tenant of the inheritance* who has an unqualified estate therein can do so; but with us, by statute, any tenant for life, years, or otherwise, to whom the inheritance does not *absolutely belong*, may be guilty of it. (3 Bl. Com. 224 & seq.; V. C. 1873, c. 133, § 14; 2 Insts. Com. & Stat. Law, 613 & seq., 616 & seq.)

The penalty or forfeiture with us is only *single damages*, but if the waste be *wanton*, (whatever that may mean), *treble damages*. (V. C. 1873, c. 136, § 4.)

Remedies; W. C.

1^s Writ of Waste.

This writ, if it existed at common law at all, existed only as a *personal action* to recover *single damages* for the waste done or suffered. Its effect as a *mixed action*, recovering the *place wasted*, and *treble damages*, was due

to the Stat. of Gloucester, 6 Edw. I, c. 5, which increased to that extent the previous penalties for waste. (2 Insts. Com. & Stat. Law, 106, 628; 3 Bl. Com. 227 & seq; *Ante*, p. 365.)

At present, in Virginia, no forfeiture of the place wasted is exacted, and therefore, the action of waste, as a *mixed action*, is certainly at an end, (V. C. 1873, c. 133, § 1, 4.) Whether it may be still available for the purpose of recovering *damages* for waste committed, it is hardly worth while to inquire, inasmuch as the statute itself prescribes a more convenient remedy, namely, *an action on the case* in all instances of waste. (V. C. 1873, c. 133, § 4; See 2 Insts. Com. & Stat. Law, 631.)

2^d. Action of Trespass on the Case.

The action of trespass on the case lies at common law to recover damages for waste; in Virginia, for the most part, damages commensurate with the injury done by the waste; but where the waste is *wantonly committed*, three times the amount of damages assessed therefor. (V. C. 1873, c. 133, § 4; 2 Insts. Com. & Stat. Law, 619.)

In England, at common law, the action of trespass on the case is the appropriate remedy where the person complaining of the injury is either not possessed of the *inheritance*, or has *not the immediate reversion*. In either of those cases the injury is, strictly speaking, *not waste*; but as it is notwithstanding *an injury*, and bears a close similitude to waste, the action of trespass on the case (but not the writ of waste), is allowed to be brought for it under the designation of *quasi waste*; so that even in England the writ of waste has fallen much into disuse, and its place has been supplied by the *action on the case*, as well where the writ of waste might be applicable as in cases where the action on the case is the exclusive remedy. (3 Bl. Com. 227 & n (7); De Jarnette v. Allen & ux, 5 Grat. 499; Rose v. Gill & ux, 4 Call. 250; 2 Insts. Com. & Stat. Law, 628 & seq.)

In Virginia, it is the proper action to be brought in all instances, in order to recover damages for waste. (V. C. 1873, c. 137, § 4.)

3^d. Writ of *Estrepement*.

This is a method of *preventive* redress, where waste is threatened or reasonably apprehended, *pending a suit* for the land, or with a view to charge it with an incumbrance.

The writ lay at common law, *after judgment* obtained in a real action, and before possession was delivered, to stop any waste which the vanquished party might commit in the lands determined to be no longer his; but by

statute Gloucester, 6 Edw. I, c. 13, a further effect was allowed to the writ of *estrepement*, namely: that it might be issued *pendente placito*, to command the sheriff to inhibit the occupant to *commit any waste pending the suit*, and if need be to prevent it by force. (3 Bl. Com. 225-6; 2 Insts. Com. & Stat. Law, 624 & seq.)

The statute in Virginia seems to have designed to afford a like protection, although it appears hardly adapted to meet the case of a mere *apprehension* of waste, however well founded, where, as yet, none has been *actually committed*. However, in such a case, a court of chancery would doubtless interpose to prevent any material injury, *imminently threatened*, even prior to any overt act. The statute enacts (V. C. 1873, c. 13, § 5), that, "If the tenant in possession of any land shall, pending any suit to *recover or charge* such land, with knowledge of such suit *commit any waste thereon*, the court in which the suit is may command the sheriff or other officer to *take possession* of the land; and if the plaintiff succeed in *recovering or charging* the land, he may recover in an action on the case against him who committed the waste *three times* the amount of damages assessed therefor."

4^s. Bill in Chancery for an Injunction.

This remedy lies where the injury arising from the waste would be (as it generally is) *irreparable*, or the legal remedy is *otherwise inadequate*. The instances of such inadequacy of the legal remedy are various. Thus the common law courts take no notice of the destruction of trees reserved or planted not for timber, but for *ornament, shade or shelter*; nor of *malicious waste* committed by a tenant who, by express agreement, is *without impeachment for waste*; nor of waste committed against mere *equitable owners* of the inheritance, and in all these cases, as well as where the injury is irremediable by damages, the courts of equity exercise a well established jurisdiction by means of a writ (or with us *an order*), of injunction prohibiting the commission or repetition of the wrong; and as incident to such jurisdiction to *exact an account* and payment of the damages suffered. (2 Stor. Eq. § 915 & seq; Bac. Abr. Waste, (N); 2 Rob. Pr. (1st ed.) 228, &c; Ad. Eq. 402 & seq; 3 Bl. Com. 227; 2 Insts. Com. & Stat. Law, 611, &c.)

5^s. Subtraction.

By subtraction is meant the neglect or omission to perform or render any suit, custom, duty, services, or rents due to another, whether by the tenure of lands, as is usually

the case, or by the custom of particular places. (3 Bl. Com. 229);

W. C.

1^s. Subtraction of Rents, and other Services *due by Tenure. Remedies.*

1^h. Summary Remedies; W. C.

1ⁱ. Distress.

The nature of distresses, their incidents, and consequences, have been already fully explained. (See 3 Bl. Com. 6, 148; *Ante*, p. 99, & seq.) It may suffice here to remember, that distress is a taking of personal chattels in a very summary way, in order to enforce the performance of something due from the party distrained upon. At common law the chattels were taken merely *as a pledge*, and had to be safely kept, in order to be restored when the party distrained upon had complied with his duty. With us, they are sold, (at least in case of distress *for rent*), and the proceeds applied to pay the money due, as in case of execution. Distress, however, is not available to recover *rent*, until the rent is actually *in arrear*; nor can it be levied on any property that has *never been on the leased premises*, nor on any removed therefrom *more than thirty days*. If, therefore, more than thirty days before the rent is due, the tenant should remove his chattels from the leased premises, the remedy by distress would not avail the landlord, and our statutes have provided for him in that instance another and a supplemental summary remedy by *attachment*. (3 Bl. Com. 131; V. C. 1873, c. 134, § 7, 10, 11 to 13 to 15; Id. c. 49, § 32 to 39; Id. c. 189, § 1 to 7; Id. c. 148, § 4, 6, 7, 8, 9, 12 to 14, 17 to 19, 20 to 26, 30, 31.)

2ⁱ Attachment.

Attachment is a statutory proceeding, as just mentioned, designed to supplement distress, when by the removal of the tenant's property from the leased premises before the rent becomes due, that remedy is or is likely to be frustrated. (V. C. 1873, c. 143, § 6 to 9, 12 to 19, 20 to 26, 30, 31.)

The nature of attachments for rent, and the mode of proceeding therewith, have already been stated in general terms, with reference to the statutory provisions upon the subject, (*Ante*, p. 123, & seq), but it will tend to a clearer understanding of the matter to present here a fuller and more complete exposition, which may be done under the heads following, namely, (1), When and how attachment for rent is obtained;

(2), For what rent an attachment may be obtained; (3), To what officer it is to be addressed; (4), How it is to be returned; (5), On what property it may be levied; (6), Mode of levying it; (7), Lien of attachment; (8), Restoration of property attached to the party from whom it was taken; (9), The keeping and sale of the property attached; and (10), Trial of attachment;

W. C.

1^k. When and How Attachment for Rent is Obtained.

The lessor, or his agent, makes complaint on *oath* to a justice, (it would seem not indispensable that it should be *in writing*, as an *affidavit* must be, *Kyle v. Connelly*, 3 Leigh, 719), that to the best of his belief the *person liable* to him for rent intends to remove, or is removing, or has within thirty days removed his effects from the leased premises; and states also on oath, to the best of his belief, the rent which *is reserved*, (whether in money or other thing), and will be payable *within one year*, and the time or times it will be so payable; and also makes oath, either that there is not, or he believes, unless an attachment issues, there will not be left on such premises property liable to distress sufficient to satisfy the rent *so to become payable*; and thereupon the justice is required to issue an attachment for the said rent. (V. C. 1873, c. 148, § 4.) The justice who issues the attachment, it is supposed, must be *of the county* or *corporation* where the leased premises are situated, (*Barnett v. Darnielle*, 3 Call. 413); but the oath which verifies the complaint may be made before any one qualified to administer an oath, whether in the county or corporation, or elsewhere. (Bart. Pract. 306; V. C. 1873, c. 12, § 3.)

2^k. For what Rent an Attachment may be Obtained.

An attachment can be obtained for that rent only which is *yet to become due*, and which will be payable *within one year*. (V. C. 1873, c. 148, § 4.) As the law formerly was, the attachment could issue only for the *instalment next to fall due*, whether that was for a month, quarter, year, &c. (*Redford v. Winston*, 3 Rand. 154, 157, 160.) This present provision enables the landlord to recover any rent payable *within one year*. The landlord cannot proceed under this statute, for rent not yet due, *before the commencement of the term* for which it is to be paid, for until then the relation of *lessor and lessee* does not exist,

nor can any *rent* be said to accrue. (Johnson v. Garland, 9 Leigh, 151.)

3*. To what Officer the Attachment is *to be Addressed*.

The attachment may be directed to the sheriff, sergeant, or constable of any county or corporation. (V. C. 1873, c. 148, § 6.)

4*. How the Attachment is *to be returned*.

If the claim is *over* \$20, (exclusive of interest) it is returnable, at the option of the plaintiff, to the next term of the *circuit, county, or corporation court* of the county or corporation in which the *leased tenement may be*. Where the claim is *not over* \$20 (exclusive of interest), the statute is silent as to the return; but it may be conjectured that the attachment would in that case be returnable before a *justice of the peace* of the county or corporation in which is the leased tenement, as if it had been a *summons*. (V. C. 1873, c. 148, § 6, 29; Id. c. 147, § 1, 2.)

5*. On what Property the Attachment may be levied.

The statute expressly declares that the attachment shall be *issued against* (and of course levied upon) such goods as might be distrained for the rent, if it had become payable, and *against any other estate of the person liable therefor*, whether it be *real or personal*. (V. C. 1873, c. 148, c. § 4.)

6*. Mode of Levying the Attachment.

The attachment is sufficiently levied in every case by a service of a copy of it on such persons as may be designated by the plaintiff *in writing*, or be known to the officer to be *in possession of effects* of, or to be *indebted to* the defendant; and as to *real estate*, by such estate being *mentioned and described by endorsements* on the attachment. (V. C. 1873, c. 148, § 7; Pulliam v. Aler, 15 Grat. 60; Clark v. Ward & als, 12 Grat. 448.)

But the officer is not to *take possession* of the property attached unless the plaintiff shall have *given bond, with security* approved by the justice who issued the attachment, in a penalty of at least double the amount of the claim, with condition to pay all costs and damages awarded against him, or sustained by any person, by reason of *his suing out* the attachment. If such bond be given, the officer is to take possession of the effects, or of so much as is sufficient to pay the plaintiff's claim. (V. C. 1873, c. 148, § 8.) But notwithstanding the apparent comprehensiveness of these terms, no action can be maintained on this bond, save by the *defendant himself*, not by

a third person claiming the property attached to be his; for such damages as may be sustained in that way could arise not by *suing out* the process, but from *executing* it. (Davis v. Common'th, 13 Grat. 141-'2 & seq.)

The bond is required to be given by the plaintiff at the time of suing out the attachment, or afterwards; and as the attachment may be issued "on complaint by the lessor, or *his agent*," (V. C. 1873, c. 148, § 4,) so it would seem the bond may be given *by the agent*, (*e. g.* one partner of a firm); but in that case, care must be taken that the recitals shall be according to the fact, setting forth the attachment as the *lessor's* attachment, *not the agent's*, and stipulating that the *lessor* shall pay all damages, &c.; for it must be observed that all summary proceedings are specially required *to be regular*, and for not conforming to the statute may be quashed by the court *ex officio*, as affording no ground of jurisdiction. (Jones & als v. Anderson, & als, 7 Leigh, 311-'12, 313 & seq; Kyles & Co. v. Connolly, 3 Leigh, 719; Mantz v. Handley, 2 Hen. & M. 308; McClung & Co. v. Jackson, 6 Grat. 96.)

The officer is required to return, with the attachment, the names of the persons having effects of, or owing debts to, the defendant, and to summon them *to appear as garnishees* (see *ante* p. 351,) at the return-day of the attachment. He is, moreover, to return a statement of the property taken, if any, and the *date of the service or levy* on each person, and on each parcel of property. And it is provided that, in a case so exceptional, the "attachment may be issued and executed *on Sunday*, (although generally *civil process* is strictly prohibited to be executed on that day,) if oath be made that the defendant is *actually removing* his effects" then. (V. C. 1873, c. 148, § 9, 10.)

7*. Lien of Attachment.

The plaintiff has a lien from *the time of levying* the attachment, or serving a copy, on the personal property, *choses in action*, and other securities of defendant in the hands of, or due from, *any garnishee* on whom it is served, and on *any real estate mentioned in an endorsement* on the attachment, from the *suing out* of the same; *but not unless so mentioned*. (Clark v. Ward, 12 Grat. 440; V. C. 1873, c. 148, § 12, 26; Tazewell's Ex'or v. Barrett & Co., 4 H. & M. 259; Wilson v. Davison, 5 Munf. 178; Shaver

v. White & als, 6 Munf. 110; Erskine v. Staley, 12 Leigh, 406; Richeson v. Richeson, 2 Grat. 497; Farmers Bank v. Day, 6 Grat. 360; Jennings v. Montague, 2 Grat. 350; Kelly v. Linkenhoger, 8 Grat. 114; Vance v. McLaughlin, 8 Grat. 289; Schofield v. Cox & als, 8 Grat. 537-'8; Moore v. Holt, 10 Grat. 284, 287; Balt. & O. R. R. Co. v. McCollough & als, 12 Grat. 295; Balt. & O. R. R. Co. v. Gallahue, 14 Grat. 563; Pulliam v. Aler, 15 Grat. 84; Smith v. Smith, 19 Grat. 545; Rolls v. Andes Ins. Co. 23 Grat. 509; Daniel on Attachments, § 148 & seq.) And the attachment lien is in nowise impaired by the defendant appealing and executing an appeal bond, in pursuance of V. C. 1873, c. 148, § 31. In order to relieve the debtor's property from the lien a replevy bond must be executed, as required by V. C. 1873, c. 148, § 13. (Magill v. Sauer, 20 Grat. 541.)

8^k. Restoration of the Property Attached to the Party from whom it was Taken.

The restoration of the property attached may be accomplished either, (1), By means of a *delivery* or *forthcoming* bond; or (2), By means of a *replevy bond*;
W. C.

1^l. Delivery or Forthcoming Bond.

The *party from whose possession* the attached property was taken may have it restored to him upon his giving a *forthcoming or delivery bond*, with good security, payable to the plaintiff, and conditioned to have the property forthcoming, *at such time and place as the court may require*. (V. C. 1873, c. 148, § 13.)

2^l. Replevy Bond.

The *defendant* against whom the claim is, instead of the delivery bond just mentioned, may release the *whole estate attached* from the attachment, by giving bond with condition to perform the *judgment or decree of the court*, and the bond in this case also is to be *payable to the plaintiff*. (V. C. 1873, c. 148, § 13, 14; Magill v. Sauer, 20 Grat. 541-'2.)

9^k. Keeping and Sale of the Property Attached.

If neither *replevied nor sold* (as presently mentioned,) it is to be kept as if *taken under execution*. But if *expensive to keep, or perishable*, it may be sold by order of court, or of the judge in vacation, in like manner as if taken under execution, except that it shall be on a credit until the rent is payable, taking

bond with good security for the proceeds. (V. C. 1873, c. 148, § 16.)

10^k. Trial of Attachment.

The trial, of course, takes place before the court to which the attachment is returnable, and at the *next term*, unless good cause for an adjournment or continuance of the case until the succeeding term be shown. (V. C. 1873, c. 148, § 6.) Let us note, (1), The defence to attachments; and (2), The interposition of third persons, claimants;

W. C.

1^l. Defence to Attachments.

In contemplating the making of defence to attachments for rent, we may take notice of (1), Who may make defence; (2), What defence may be made; and (3), The judgment for the plaintiff in attachment;

W. C.

1^m. Who may make Defence.

Defence may be made by *the defendant* in the attachment; by *any garnishee*; by *any party to a forthcoming or replevy bond* given in the case; or by *the officer* who may be liable for not taking a good bond; but the attachment is *not thereby discharged*, nor the *property released*. (V. C. 1873, c. 148, § 21.) This provision obviates the former rigor of the law which did not permit the defendant to contest the case without giving security to perform the decree, whereupon the property was discharged, or if the giving of the security were waived by the plaintiff, the property was no less discharged. (Tiernan v. Schley, 2 Leigh, 25.)

2^m. What Defence may be made.

The right to sue out the attachment *may be contested*, and if the court is of opinion that it was issued on *false suggestions*, or *without sufficient cause*, judgment shall be entered that the attachment *be abated*. If properly sued out, and *upon the merits* the court is of opinion that the *plaintiff's claim is not established*, final judgment is to be given for the defendant, and in either case *with costs*, and an order for the restoration of the property attached. (V. C. 1873, c. 148, § 22; Claffin v. Steenbock, 18 Grat. 842; Mantz v. Hendley, 2 H. & M. 312; Wright v. Rambo, 21 Grat. 158.)

Upon a motion *to abate*, if neither party *demand a jury* the cause may be determined by the court itself, it not being needful that there should be a *formal waiver* of jury-trial. And upon such a

motion, the question is, whether upon *all the facts existing* in the case there was reasonable ground or "*probable cause*" to believe that the defendant was removing, &c., his effects, and not whether the facts, as they *appeared to the affiant*, (though perhaps only a small part of the facts of the case), afforded him reasonable ground for such a belief. (*Claffin & Co. v. Steenbock & Co.*, 18 Grat. 855-'6 & seq. 870-'71. But see *Id.* 847 & seq; and *Spengler v. Davy*, 15 Grat. 381.)

The present form of the statute, it may be observed, was brought about by the decision in *Redford v. Winston*, 3 Rand. 148, in which, it was held that as the law then was, it was not competent to the tenant to contest the landlord's oath on the attachment issued, and to show that in fact there was *no sufficient reason* to believe that he would remove, &c., his effects.

In order to avoid a needless multiplication of suits, it is provided that where upon the defence (doubtless as made by the defendant in the attachment), it be found, either by court or jury, that the attachment was sued out *without sufficient cause*, judgment may be entered for the defendant against the plaintiff, for the damages sustained by the defendant by reason thereof, (V. C. 1873, c. 148, § 30); but in computing those damages the plaintiff's conduct is to be estimated with reference to the facts *known to him*, and not to *all the facts existing*. (*Claffin & Co. v. Steenbock & Co.* 18 Grat. 847, 870, 842.)

Upon a motion by the defendant to abate an attachment, the burden is upon the plaintiff to show that the attachment was issued on sufficient grounds, and he, therefore, must open and conclude the cause. (*Wright v. Rambo*, 21 Grat. 162.)

3^m. Judgment for Plaintiff on the Attachment.

If the claim of the plaintiff be established, judgment shall be rendered for him. (V. C. 1873, c. 148, § 23.)

W. C.

1^a. Judgment for Plaintiff in respect to the Visible Property Attached.

The personal effects not previously replevied or sold as *perishable*, &c., and the real estate, shall be ordered to be sold; and the proceeds of sale, and whatever else is subject to the attachment, including what is embraced by any replevy

or forthcoming bond which may have been given, are to be applied in satisfaction of the judgment. But no real estate is to be sold until all other property and money subject to the attachment, has been exhausted, and then only so much as is necessary to pay the judgment. But if the defendant against whom the complaint is has not appeared, or been served with a copy of the attachment sixty days before the judgment, the plaintiff cannot have the benefit of such order of sale until he gives bond with security in a penalty approved by the court, conditioned to perform such future order as may be made upon the appearance of the defendant and his making defence. And if he fail to give the bond in a reasonable time, the court shall dispose of the estate attached, or its proceeds, as shall seem just. (V. C. 1873, c. 148, § 23, 24.)

There may be also, it seems, a *personal judgment* against the defendant when he thus *enters his appearance* and makes defence, (O'Brien & als v. Stephens & als, 11 Grat. 613-'14); and if he does appear to contest the merits, and afterwards, by leave of the court, withdraws his plea, his appearance is not thereby withdrawn, and he is still in court so as to be bound personally by a judgment against him. (Eldred v. Bank, 17 Wal. 551; Fisher v. March, 26 Grat. 772.)

2ⁿ. Judgment for Plaintiff in respect to the Garnishees.

The garnishees are, as we have seen, summoned at the first institution of the attachment, and may be compelled to appear if the plaintiff desire it. If the garnishee appears in obedience to the summons, he is required to disclose on oath, whether he is in any form indebted to the defendant, or has in his possession, or under his control, any of the defendant's effects; and the court may order him to pay the amount thus ascertained to be due by him, and to deliver the effects in his hands to such person as it may appoint as receiver, or to secure such payment and delivery when and where the court may require. And if the plaintiff suggest that the garnishee has not fully disclosed all that he owes, and all the effects in his possession, the court shall cause a jury to be impannelled to inquire. (V. C. 1873, c. 148, § 17, 19.)

On the other hand, should the garnishee fail to obey the summons, the plaintiff, instead of compelling him to appear as he may, is at liberty to ask the court to hear proof of the debt he owes defendant, and the effects of his in his hands, and the court may give judgment accordingly. (V. C. 1873, c. 148, § 18; Balt. & O. R. R. Co. v. Gallahue, 14 Grat. 561, 568; Pulliam v. Aler, 15 Grat. 54.)

2¹. Interposition of *Third Persons Claimants*.

At any time before the property attached is sold, or the proceeds paid over to the plaintiff, any person may file his petition, disputing the validity of the attachment on the property, claiming it as his own, or asserting an interest in or lien on the same, under another attachment or otherwise; and upon giving security for costs, the court, without any other pleading, shall impanel a jury to inquire into such claim; and if it be found for the petitioner, the court shall make such order as will protect his rights, awarding costs at its discretion. (V. C. 1873, c. 148, § 25; McCluny & Co. v. Jackson, 6 Grat. 96.)

Formerly no one was allowed thus to interplead in attachments *for rent*, (Hallam v. Jones, Gilm. 142), but *for debts only*. This provision seems unquestionably to permit it.

3¹. Re-Entry by the *Lessor, &c.*

If the rent be reserved by *way of condition*, the right of re-entry results as *incident to the condition*, without any words to that effect; *e. g.* "I demise Black-acre to J. S. for ten years, *on condition* that he pay \$100 a year rent therefor at Christmas of every year." But if the rent be not reserved on condition, but as an agreement, there can be no re-entry at common law, without a stipulation to that effect. But we have a statute in Virginia enacting that if *any tenant* from whom rent is in arrear and unpaid, shall desert the demised premises, and leave the same *uncultivated and unoccupied, without goods thereon* subject to distress, sufficient to satisfy the said rent, the lessor or his agent may post a notice upon a conspicuous part of the premises, requiring the said tenant to pay the said rent *within one month*. And if not paid, the lessor may enter on the premises, and the right of the tenant thereto shall be at an end. But the landlord may recover the rent *up to that time*. (V. C. 1873, c. 134, § 16 to 25.) And by another statute, applicable only to tenants in a *city or town*, it is provided that, if de-

fault in the payment of rent by such tenant shall continue for *five days* after notice *in writing*, requiring possession of the premises or payment, the tenant's possession shall, at the landlord's option, be deemed unlawful, and may be recovered by the writ of unlawful detainer. (V. C. 1873, c. 130, § 4.)

4ⁱ. *Nomine Penæ.*

This is no more than an obligation *under a penalty* to pay the rent. It is hardly to be styled a *remedy*. (Gilb. Rents, 140, &c.)

2^b. Remedies for Rent by *Suit or Action*.

The remedy for rent by suit or action may be, (1), By action *at law*; or (2), By suit *in equity*; W. C.

1ⁱ. Action *at Law*.

The actions at law, whereby rent is recovered are either, (1), Personal actions; or (2), Real actions; W. C.

1^k. Personal Actions.

See 3 Bl. Com. 231.

A remarkable doubt was long cherished in England, whether a *personal action* could be maintained for the *arrears of a freehold rent*, thus confounding the *profits* of the subject, (which are as much personalty as wheat or corn severed from the land), with the subject itself. A similar idea is presented in *Miller v. Marshall & als*, 1 Va. Cas. 158, wherein it was held that a *justice of the peace* could not give judgment for the arrears of a *rent in fee*. (3 Bl. Com. 232.) Accordingly, statutes were enacted in England to allow *actions of debt* to recover the arrears of freehold rents, (8 Anne, c. 14, and 5 Geo. III, c. 17); and in Virginia a somewhat corresponding provision exists, (V. C. 1873, c. 134, § 7), declaring that "rent of every kind may be recovered *by distress or action*," without limiting it to the *action of debt*.

The personal actions which may be resorted to in order to recover arrears of rent are, (1), The action of debt; (2), Trespass on the case in *assumpsit*; (3), Covenant; and (4), Account; W. C.

1ⁱ. Action of Debt.

By this action the arrears of rent are recovered in Virginia, *with interest* from the time the rent is payable, as in *other contracts*. (V. C. 1873, c. 134, § 7.) But independently of statute, at common law, interest was recoverable only when contracted for, or when from peculiar circumstances, to be de-

terminated by the discretion of the court or jury, justice so required. (Graham v. Woodson, 2 Call. 249; Skipwith v. Clinch, Id. 253; Cook v. Wise, 3 H. & M. 468; Newton v. Wilson, Id. 470; Dow v. Adams, 5 Munf. 21; Michie v. Wood, 5 Rand. 571.)

2¹. Action of Trespass on the Case in *Assumpsit*.

This action is proper where the promise to pay the rent is *not under seal*; and the object is to recover, in the form of damages for the breach of promise to pay, the amount of rent due, with interest. The lease may be under the *lessor's seal*, reserving rent, and still the action of *assumpsit* lies, if it be not also under the *seal of the lessee*. His acceptance of the lease, and entering upon the land in pursuance of it, is an *implication* of a promise to pay; but it is not an *express promise*, much less a promise under seal. Debt and *assumpsit* are, therefore, concurrent remedies for rent, where the lessee's promise to pay it is *not under seal*. (1 Chit. Pl. 120, 376-'7; *Ante*, p. 348, & seq.)

It was formerly considered that *assumpsit* lay only where the promise to pay the rent was *express*, and not where it was *implied*; but such a distinction is obviated in England (if indeed it was ever fairly acknowledged there) by the statute, 11 Geo. II, c. 19, and in Virginia has never been recognized. (Eppes v. Cole, 4 H. & M. 161; Sutton v. Mandeville, 1 Munf. 407.)

3¹. Action of Covenant.

As the action of trespass on the case in *assumpsit* lies to recover, in the *form of damages*, the amount of the rent in arrear, when the promise to pay it is *not under seal*, so covenant lies to recover, in the form of damages, the amount of the rent which is due, when the promise of the lessee to pay it is *under seal*. And as in the former case debt and *assumpsit* are concurrent remedies, so also in the latter are for the most part debt and covenant. (1 Chit. Pl. 131, 133-'4; *Ante*, p. 346.)

4¹. Action of Account.

If rent be claimed on one side, and *counter demands* be set up on the other, with proper circumstances of *privity* accompanying, as the nature of the action requires, (*Ante*, p. 346,) there seems to be no reason why the action of account may not be maintained as well as in other cases of similar mutuality and privity; although, considering the in-

conveniences and delays attending that action, a prudent practitioner might well hesitate to resort to it, and rather choose to employ a *bill in equity*, where there was such a complication growing out of mutual demands as to make it inexpedient to submit the matter to be determined by a jury. (3 Rob. Pr. (2nd ed.) 410 & seq; Bac. Abr. Accompt; 1 Stor. Eq. § 449 & seq; Id. § 508; *Ante*, p. 346, &c.)

2*. Real Actions for Rent.

Real actions for rent contemplate a direct inquiry into the *right to demand it*, when a freehold estate therein is claimed. The principal object of such actions is to determine the *abstract legal right* of the claimant, although they allow incidentally, of the *recovery of the arrears* which have fallen due, which should denominate them rather *mixed* than *real* actions. Rent being an *incorporeal right*, it is not possible that there should be an actual *disseisin* thereof; but the owner *may elect* to consider himself disseised whenever the payments are not punctually made; and it is on that basis of an *elective disseisin* that real actions for rent are founded. (3 Bl. Com. 232 & seq; Gilb. Rents, 106.)

The real actions for the purpose of ascertaining the right to demand freehold rents, and also for the recovery of the arrears thereof, are, (1), Writ of assize of *mort d'ancestor*, &c.; (2), Writ *de consuetudinibus et servitiis*; (3), Writ of *cessavit*; and (4), Writ of right, *sur disclaimer*;
W. C.

1¹. Writ of Assize of *Mort d'Ancestor*, or of Novel Disseisin.

This action is not likely to be often resorted to in practice with us, yet where rent *granted* is in arrear, and the remedy by distress is unavailable, either because the rent may not be distrained for, or because no sufficient distress is found on the premises, the writ of assize might be used to advantage in order to charge the arrears due, *specifically upon the land* out of which the rent issues, according to the *terms of the grant*. Although disused, it is still a subsisting action in Virginia. (V. C. 1873, c. 15, § 2; Gilb. Rents. 190, 106; *Ante*, p. 342.)

2¹. Writ *de Consuetudinibus et Servitiis*.

This remedy lies for the lord against his tenant who withholds from him the rents and services due by *custom or tenure* for his land. It has the advan-

tage of compelling *specifically* the payment or performance of the rent or service. If, as is supposed, the *custom* alluded to is a *local law*, there can be no such rent or service with us, (Harris v. Carson, 7 Leigh, 632 ; Mason v. Moyers, 2 Rob. 606 ; 1 Insts. Com. & Stat. Law, 34,) nor is there any *feudal tenure* in Virginia, (10 Hen. Stats. 64 ; 2 Insts. Com. & Stat. Law, 75.) It is, therefore, apprehended that no rents and services to which this remedy is applicable can exist in Virginia, and consequently that this writ cannot be employed here. See 3 Bl. Com. 232.

3¹. Writ of *Cessavit*.

The writ of *cessavit* is given by the statute of Gloucester, (6 Edw. I, c. 4), and of Westm. II, (13 Edw. I, c. 21 and 41), whereby when a man who held lands of a lord, neglected or *ceased* to perform his services for *two years together*, the lord and his heirs should have a writ of *cessavit* to recover the *land itself, eo quod tenens in faciendis servitiis per biennium jam cessavit*. (2 Bl. Com. 232 & seq.)

These statutes having never been *in terms* enacted in Virginia, do not exist here, but the writ which they give is reserved to our people. (V. C. 1873, c. 15, § 2.) It is, however, *practically* out of use, although the need of a similar remedy has constrained the legislature to devise several which meet the exigency in an analogous way. Thus, it is provided, that if any tenant from whom rent is in arrear and unpaid, shall *desert the demised premises*, and leave the same *uncultivated and unoccupied*, without goods thereon subject to distress, sufficient to satisfy the said rent, the lessor, or his agent, may post a notice in writing upon a conspicuous part of the premises, requiring the tenant to pay the said rent *within one month*. If the same be not paid within that time, the lessor shall be *entitled to possession of the premises*, and may *enter thereon*, and the right of such tenant thereto shall *thenceforth be at an end*. But the landlord may recover the rent *up to that time*. (V. C. 1873, c. 134, § 6.) And it is provided by another section of the same chapter, (V. C. 1873, c. 134, § 16, 17), that any who shall have a *right of re-entry* into lands, by reason of any rent issuing thereout, being in arrear, &c., may serve a declaration in ejectment on the tenant in possession in person, or if there be no tenant, by affixing the declaration upon the

chief-door of any messuage, or at any other notorious place on the premises; which service shall be in lieu of a demand and re-entry; and upon proof to the court by affidavit in case of judgment by default, or upon proof on the trial, that the rent claimed was due, and no sufficient distress was upon the premises, or that the covenant or condition was broken before the service of the declaration, and that the plaintiff *had power thereupon to re-enter*, he shall recover judgment, and have execution for such lands; and should the defendant not pay the rent in arrear, with interest and costs, nor file a bill in equity for relief against the forfeiture within *twelve calendar months* after execution executed, he shall be barred of all right in law or equity to be restored to such lands. And by yet another statute it is enacted that, if any tenant in a city or town shall continue in default in the payment of rent for *five days* after notice *in writing*, requiring possession of the premises, or payment of the rent, his possession may, at the option of the landlord, be deemed unlawful, and the latter may recover the same by writ of unlawful detainer. (V. C. 1873, c. 130, § 4.)

4¹. Writ of Right *Sur Disclaimer*.

This is a writ provided for those cases where the tenant disclaims *in a court of record*, to hold of his lord, and enables the lord, upon proof of the tenure, to recover possession of the land so holden, as a punishment to the tenant for his false disclaimer. It seems to be the better opinion, that a similar forfeiture for a like offence exists in Virginia, (1 Lom. Dig. 593, 821; 2 Insts. Com. & Stat. Law, 106, 239); but it may be doubted whether the forfeiture can with us be enforced by this writ, in consequence of the statute, (V. C. 1873, c. 131, § 38), which declares that "*no writ of right, &c.*, shall be brought after the commencement of this act;" *i. e.*, July 1st, 1850. See 2 Bl. Com. 233. But the land may be recovered *by ejectment, &c.*

Whilst the law thus sedulously guards the rights of the landlord, it is by no means inattentive to the just complaints of the tenant. The ancient law provides redress for the latter against the injustice and oppression of the lord by two writs, namely: (1), The writ of *ne injuste vexes*; and (2), The writ of *mesne*; for which, as the first is not applicable here,

and the second is not used, reference is made to Blackstone's account (3 Bl. Com. 234.)

The remedy provided by our statute is that practically employed in England (2 Chit. Pl. 719), *an action on the case*, whereby is recovered damages for the wrongful seizure by distress or attachment, and also, if the property be sold, for the sale thereof, (V. C. 1873, c. 146, § 3, 6; Id. c. 134, § 14; Id. c. 49, § 35.)

2^d. Remedy for Rent by *Suit in Equity*.

Equity exercises its extraordinary jurisdiction for the recovery of rent, upon the same principle which usually controls its action, namely, the *want of an adequate remedy at law*. Thus, if the deeds by which a rent is created are lost, so that it is uncertain what kind of a rent it is; or if, by confusion of boundaries, or otherwise, the lands out of which it issues cannot be exactly ascertained, so as to admit of a distress; or if there is an apparent uncertainty or perplexity as to the title, or as to the extent of the party's responsibility against whom relief is sought, or if for any other reason a *discovery* is needed from the defendant, in all such cases a court of equity entertains jurisdiction. So if a lease of an incorporeal thing *is assigned*, such as a right of common or of way, and the assignee enjoys it, he will be decreed *in equity* to pay the rent, although not bound in law. So if an assignee of a term rendering rent assign over, the lessor may in equity recover the rent of such assignee for the time he occupied the premises, although he have no remedy at law. And a *cestui que trust* of a lease rendering rent may be compelled, in equity, to pay the rent during the time he has taken the profits, if his trustee (the legal tenant) has become insolvent. (1 Stor. Eq. § 684 & seq; A. D. Eq. 447-'8; 1 Foubt. Eq. 156 B. I. c. III, § iii, & notes; 2 Rob. Pr. (1st ed.) 864; Graham v. Woodson, 2 Call. 249.)

2^d. Subtraction of Services due by *Custom of Particular Places*, or by *Prescription*.

Having seen the nature of the subtraction or *withholding* of rents or other services *due by tenure*, and the remedies therefor, it remains to advert to such *services* as are due, not by the tenure of lands, but by the *custom* of particular places, or by *prescription*, such as that of *doing suit to another's mill*; where the persons resident in a particular place, or district, by usage *time out of mind*, have been accustomed to grind their corn at a certain mill, acknowledging their *legal obligation* so to do; and afterwards any of them go to another mill,

and withdraw their suit (their *secta, a sequendo*) from the ancient mill. This is an injury to the owner, for the prescription may have had a very reasonable foundation, namely, that the mill was erected originally for the convenience of the inhabitants, upon an agreement that they and their successors in their lands would all grind their corn there. (3 Bl. Com. 235; *Coryton v. Lithebye*, 2 Saund. 115; S. C. 2 Lev. 27.)

When such service depends on the *custom of a particular place*, in the sense of a *local law*, it cannot exist in Virginia, as we have seen; but when the right depends on an enjoyment by the claimant and his ancestors or predecessors, *uninterrupted, peaceable, adverse and immemorial* (which constitutes *prescription*), it may as well exist here as in England; and if the enjoyment, being peaceable, uninterrupted, and *adverse*, has continued twenty years, it is *conclusive evidence* of immemoriality. (2 Bl. Com. 35, n (28); 1 Lom. Dig. 673, 786-'7; *Coalter v. Hunter*, 4 Rand. 58; *Stokes & als v. Upper Appomattox Co.* 3 Leigh, 318; *Nichols v. Aylor*, 7 Leigh, 546; 3 Kent's Com. 441; 1 Insts. Com. & Stat Law, 34; 2 do. 18.)

The common law appointed a specific remedy for injuries, such as have just been described, namely, a writ *de secta ad molendinum*, to compel the recusant to do the stipulated suit at that mill; and by parity of reason, the writs *de secta ad furnum, ad torrale, &c.* to oblige persons under the influence of such prescriptions, to frequent the plaintiff's *bake-oven*, his *malt-house*, &c. These specific remedies, however, have in process of time, without being abolished, yielded in practice to the *action of trespass on the case*, to repair the party injured in damages. (2 Bl. Com. 235; *Coryton v. Lithebye*, 2 Saund. 113 b, 115, 116 & n (2); S. C. 2 Lev. 27.)

6^c. Disturbance.

Disturbance is a wrong to one, in respect to some interest in *incorporeal hereditaments*, by hindering or disquieting the owner's enjoyment thereof. (3 Bl. Com. 236.) It may at common law relate to several different subjects, namely: (1), *Franchises*; (2), *Commons*; (3), *Ways*; (4), *Tenure*; (5), *Patronage in the church*;
W. C.

1^a. Disturbance of *Franchises*.

This happens where a man has any franchise, such as that of a ferry, or toll-bridge, or turnpike, &c., and he is disturbed or incommoded in the lawful exercise and enjoyment thereof. As if another, by menaces or persuasions, prevails upon persons not to use my ferry, bridge,

or road, or obstructs the approaches thereto, or without authority of law establishes a rival ferry, bridge or road, whereby my property is damnified, and the profits of my franchise are diminished. (3 Bl. Com. 236-'7.)

The remedy for the injury, as in all other cases of *disturbance*, is the action of trespass on the case to recover damages, (3 Bl. 237; 1 Chit. Pl. 162); and in Virginia, specific penalties besides are inflicted for invasion of *ferry rights*. (V. C. 1873, c. 64, § 21 & seq.)

2^s. *Disturbance of Common.*

This may happen where one who has no right of common presumes to take upon himself to share the profit of one, as by putting his cattle into the pasture; or where, having a right of common, say of pasture, he puts in cattle not commonable, or more in number than was agreed for. The owner of the land, or any commoner, may *distrain* the beasts of a stranger, or the uncommonable cattle of a commoner, found thus trespassing upon a common; but a more eligible remedy is an action of *trespass on the case* for damages. (3 Bl. Com. 237.)

3^s. *Disturbance of Ways.*

This injury may be effected by any obstruction of a private right of way over another's grounds, as by enclosures, ploughing across it, or otherwise. If the right of way be *annexed to land* as appendant or appurtenant thereto, the disturbance of it amounts to a *nuisance*, and may be proceeded against accordingly; but if it be a *way in gross*, that is, merely annexed to the owner's person, it is *not a nuisance*, and the general remedy therefor is *trespass on the case*, for damages. (3 Bl. Com. 241-'2.)

4^s. *Disturbance of Tenure.*

This inquiry does not have reference to *feudal tenure* in particular, but is the interference with that connection which subsists between landlord and tenant in any case where one leases lands from another. To that connection the law pays a high regard, and will not suffer it to be wantonly dissolved by the act of a third person. To have an estate well tenanted is an advantage of great value, and, therefore, the driving or enticing away a tenant is an injury of no small consequence. The remedy is by action of *trespass on the case*, for damages. (3 Bl. Com. 242.)

5^s. *Disturbance of Church Patronage.*

As this injury cannot exist where there is no church *by law established*, it will suffice to desire the student to read Blackstone's observations upon the wrong, and the remedies for it. (3 Bl. Com. 242 & seq.)

2°. The Wrongs which *Concern the Commonwealth*, and the Remedies therefor; W. C.

1^a. The Wrongs where *the Commonwealth is the Aggressor*, and the Remedies therefor.

It is presumed that the commonwealth will never inflict an injury *on the person* of one of its subjects, and the law holds it more conducive to the peace and order of society to insist on that presumption, than by discarding it, to seek to provide precarious remedies for improbable wrongs, and thereby endanger, perhaps seriously, the general tranquillity. In respect to *property*, however, the commonwealth may, by inadvertence and misinformation, commit wrongs against the rights of individuals, which are in point of fact too frequent to be overlooked, and which, without prejudice to its dignity and peace, the commonwealth may, and ought to, submit to its judicial tribunals, and to abide by their determination.

It is a settled principle of universal jurisprudence, that *no sovereign* can ever be sued, save with his own consent, and of course subject to such limitations as he may think fit to impose. For the most part sovereigns refuse to submit their causes to any tribunals but their own, although occasionally they agree to refer international controversies to sovereign arbitrators, or to boards of arbitration composed of learned jurists selected from various countries.

Complaints which *individuals* make against them they invariably require to be determined by their own courts of justice, and none other. The supposition is that, in matters of property, a sovereign can never *design* to do an injury to a private person, subject or stranger, and that nothing more is necessary than to acquaint him with the fact, in order to insure redress.

Of these remedies against the aggressions of the crown the common law of England seems to have allowed but two, namely, the *petition of right*, and the *monstrans de droit*, the latter of which was considerably improved by statute, and another remedy, to wit, by *traverse of office*, added. In Virginia three remedies have been provided against the commonwealth by statute, that is to say, by *petition to the circuit court*, in case of lands alleged to be wrongfully excheated; by *petition or bill in chancery to the circuit court of the city of Richmond*, in case of claims against the commonwealth, other than for money cognizable by the auditor of public accounts; and by *application to the first auditor* in respect to *pecuniary claims founded on statutes*. Whether the English statutory remedies are to be understood as abrogated is not quite certain, although to some it may seem probable. At all events, the three statutory remedies with

us, above-named, meet, it is believed, every conceivable case of complaint against the commonwealth;

W. C.

1°. Remedies Existing at Common Law; W. C.

1st. Petition of Right.

The petition of right is a proceeding in *chancery*, originating at common law, it is said, under the auspices of Edward I, and used where the king (in England, or with us the commonwealth,) is in full possession of any hereditaments or chattels, and the petitioner suggests such a right as controverts the title of the crown, grounded on facts disclosed in the petition itself, in which case he must be careful to state truly the whole title of the crown, otherwise the petition shall abate; and then upon this answer being endorsed on the petition by the king, *soit droit fait al partie*, (let right be done to the party), a commission issues to inquire of the truth of this suggestion; after the return of which the king's attorney is at liberty to plead in bar, or to demur, and the merits are then determined as in suits between subject and subject. And if the right be determined against the crown, the judgment is *quod manus domini regis amoveantur, et possessio restitatur petenti, salvo jure domini regis*, whereby the crown is instantly out of possession, without the necessity for the indecent interposition of its own officers. (3 Bl. Com. 256-'7; Bac. Abr. Prerog (E); 1 Th. Co. Lit. 303 & seq; and n's (N) and (O); Baron de Bode's Case, 8 Ad. & El. N. C. (55 E. C. L.) 208, where the mode of proceeding is stated.

2^d. *Monstrans de Droit*.

The proceeding by *monstrans de droit* is likewise in *chancery*. At common law it lies only where the whole case, as well the right of the party as the right of the crown, appears upon record; and the petitioner putting in a *claim of right*, grounded on facts already acknowledged and established, prays the judgment of the court whether, upon those facts, the king or the claimant himself hath the right. Thus, if a disseisor dies seised of lands, and without heir, and the inquisition of escheat finds as *well the disseisin*, and the *better title of the claimant*, as the fact of the disseisor's death without heir, the party grieved might have at common law a *monstrans de droit*. But a finding so special could seldom happen, and the remedy by *petition* being extremely tedious and expensive, that by *monstrans* was much enlarged, and rendered almost universal by several statutes, particularly by 36 Edw. III, c. 13, and 2 & 3 Edw. VI, c. 8, which also allow inquisitions of office to be *traversed* or denied wherever the right of a subject

is concerned, except in a very few cases. The judgment, if against the crown, is in the same terms, and accompanied by the like result as in the case of a *petition of right*. (3 Bl. Com. 256-'7; Bac. Abr. Prerog. (E); 2 Tidd's Pr. 1075; 4 Co. 55 a & b; Edwards v. Van Bibber, 1 Leigh, 194; French v. Com'th, 5 Leigh, 516 & seq; Fiott v. Com'th, 12 Grat. 565; Bac. Abr. Prerog. (E), 7.)

These remedies by *petition of right* and *monstrans de droit*, were expressly recognized by our statutes prior to the revision of 1849, (1 R. C. 1819, c. 82, § 7, 15 to 20), and so also was the *traverse of office*. In the Code of 1849 and 1873, however, they are all omitted, and seem to have been designed to be substituted by the *petition to the circuit court*, presently to be mentioned. (V. C. 1873, c. 109, § 8, &c.) As they are supposed to be "*writs remedial or judicial*," it is apprehended that they are within the reservation contained in V. C. 1873, c. 15, § 2. And so far as they existed *at common law* there seems no reason to doubt that they remain to us unimpaired.

2°. Remedies Arising out of Statutes; W. C.

1^f. Traverse of Office.

The *traverse of office* is a proceeding first allowed by statute 2 & 3 Edw. VI, c. 8, whereby the subject is permitted to *contest and deny* the truth and validity of inquests of office. It was expressly recognized by former statutes of Virginia, (1 R. C. 1819, c. 82, § 7, 18, and 20); but those provisions being omitted in the Code of 1849 and 1873, and being substituted, as it appears, by a *petition to the circuit court*, presently to be mentioned, (V. C. 1873, c. 109, § 8, &c.) it may possibly be doubted if the *traverse of office* exists here, though, as we have just seen, it seems to come within the provision of the statute, (V. C. 1873, c. 15, § 2,) reserving remedial and judicial *writs*. (3 Bl. Com. 256-'7; Bac. Abr. Prerog. (E); 2 Tidd's Pr. 1075; Sadler's Case, 4 Co. 55 a & b; French v. Comm'th, 5 Leigh, 515 & seq.)

2^f. Petition to the Circuit Court.

This is a remedial procedure allowed by statute in Virginia, and is applicable only to cases of *escheated lands*. When a party claims that lands in which he is interested have been escheated to the commonwealth contrary to law, whether his interest be *legal or equitable*, he may, before the land is sold by the commonwealth, apply for redress by petition (which is understood to be equivalent to a *bill in equity*), to the *circuit court* of the county or corporation, where the proceedings of escheat took place, making the escheator a defendant, who shall file an answer; and upon the petition, answer, and evidence, the case shall

be heard without *unnecessary delay*. Disputed facts are ascertained *by a jury*, whose verdict, however, if the court sees fit, it may set aside, and have a new jury impannelled, and the decision of the cause shall be such as the rights of the parties require. The lands, pending the petition, may be committed to the claimant on his giving bond with good security to pay the rents and profits to the commonwealth, if the right be found in its favor; or if the lands be not so committed, they remain in the escheator's hands, to be by him leased out, he being answerable to the commonwealth or claimant (according as the right is determined,) for rents and profits, and for *waste*. (V. C. 1873, c. 109, § 8 to 12, 28; *Edwards v. Van Bibber*, 1 Leigh, 194; *Comm'th v. Hite*, 6 Leigh, 588; *Fiott v. Comm'th*, 12 Grat. 564; *Watson v. Lyle*, 4 Leigh, 236.)

3^d. Petition, or Bill in Chancery to the *Circuit Court of the City of Richmond*.

Where a person has *any claim* against the commonwealth, other than a pecuniary claim cognizable by the auditor of public accounts, redress may be obtained in the circuit court of the city of Richmond, by a *petition*, or by a *bill in chancery*, according to the nature of the case. The auditor is to be made defendant, and is to answer the complaint, and the cause is to be heard without unnecessary delay, upon the petition or bill, the answer and the evidence. Facts disputed may be submitted to a jury, and the sentence of the court shall be such as law and equity may require. (V. C. 1873, c. 44, § 1 to 3.) But no judgment or decree against the commonwealth shall be paid without a special appropriation therefor by law. (Id. § 6; Acts 1874-'5, p 253, c. 208.)

This remedy is said to comprehend every right in *law and equity* which any person can be entitled to demand of the commonwealth. (*Com'th v. Beaumerchess*, 3 Call. 122; *Atto. Gen. & Turpin*, 3 H. & M. 548.)

4^d. Application to the *Auditor of Public Accounts*.

Any person having any *pecuniary claim* against the commonwealth, upon *any legal ground*, may present the same to the auditor of public accounts, (except in certain named classes), and he shall allow so much thereof as may appear to be due. (V. C. 1873, c. 43, § 7 to 20.) And if such claim be disallowed, in whole or in part, the claimant may petition the *circuit court of the city of Richmond* for redress. (V. C. 1873, c. 44, § 1, &c.)

2^d. Remedies where the *Commonwealth is the Sufferer*.

The remedies in favor of the commonwealth are (1), Such usual common law actions as are consistent with the prerogative and dignity of the commonwealth; (2), Inquest

of office; (3), Writ of *scire facias*; (4), Information of intrusion, of debt, or *in rem*; (5), Writ of *quo warranto*; and (6), Writ of *mandamus*;
W. C.

1°. Such usual Common Law Actions as are *consistent with the Prerogative and Dignity* of the Commonwealth.

As the commonwealth, by reason of its legal ubiquity, cannot be disseised or dispossessed of any real property which is once vested in it, it can maintain no action which supposes a dispossession of the plaintiff, such as an *assize* or an *ejectment*. Although, if the object of the suit were actually to try, not the right of the commonwealth, but of *its lessee*, an ejectment may be brought. (3 Bl. Com. 257, & n (21).) Hence the commonwealth may have an action of trespass for taking away its goods, or for breaking its close, and doing other *injury to its possession*. But for this latter class of injuries (to lands) it has easier and more effectual remedies by such *prerogative* modes of process as are peculiar to the commonwealth. (3 Bl. Com. 257-'8.) In Virginia, to enforce the payment of money, the proceeding at law may be, as in case of individuals, *by action or motion*. (V. C. 1873, c. 41, § 1, 2; Id. c. 165, § 1, (cl. 4).)

2°. Inquest of Office.

Inquisition, or *inquest of office*, is an enquiry made by the proper officer, at common law, sheriff, coroner, or escheator, *virtute officii*, or by writ sent to them for that purpose, or by commissioners specially appointed, concerning any matter that entitles the king to the possession of lands or chattels. (3 Bl. Com. 258.) It is believed that, in Virginia, such inquisitions are taken by *escheators only*, touching *lands* alleged to be *without a lawful owner*. (V. C. 1873, c. 107, § 3 & seq.) Chattels derelict, or without a lawful owner, the commonwealth may recover by a *bill in equity*, (V. C. 1873, c. 107, § 30 to 32,) and property forfeited by the violation of any law, the court where the offender is convicted shall order the sheriff or sergeant to sell (V. C. 1873, c. 107, § 29.) In strictness, perhaps, these may be denominated *inquests of office*. But as with us no suicide nor attainder of felony works any forfeiture of estate, (V. C. 1873, c. 195, § 5,) the various instances of such forfeitures mentioned by Blackstone (3 Bl. Com. 258 & seq.) are now unknown to our law.

When the title to be escheated is *equitable* the escheator proceeds by *bill in equity*, he and his jury having cognizance of *legal estates only*. (Commonwealth v. Martin, 5 Munf. 117; Commonwealth v. Selden, 5 Munf. 160; Hubbard v. Goodwin, 3 Leigh, 492.) In cases where the estate is *legal*, the proceeding is by *office found*. Upon receiving

information from the commissioner of the revenue, or from any other person, in writing and under oath, that there are lands liable to escheat, he is required to give notice of the time of taking the inquest, by advertisement at the door of the court house for thirty days, including a court day. For his inquest sixteen jurors are summoned, who must be *freeholders*, and the jury must consist of *at least twelve*. They must meet at the *court house*, and *sit in public*, and may be adjourned by the escheator from day to day, every person being suffered to give evidence openly in presence of the jurors. The verdict, which must be concurred in by at least twelve jurors, is to be signed by those concurring, and by the escheator; and he must return it *within thirty days* to the clerk of the circuit court of the county, &c., and *within sixty days* transmit to the register of the land office a certificate showing the lands escheated, their quantity and locality, and the names of the persons to whom they belonged. The clerk of the circuit court is, *within thirty days* after receiving the inquisition, to deliver a copy to the clerk of the county or corporation court, *to be recorded*. Ample provision is made to secure the rights of all persons who are in any wise concerned, as claimants of the lands or as creditors of the last owner. (V. C. 1873, c. 107, § 1 to 5, 7, 14 & seq, 25 to 28.)

Inquests of office are devised as an authentic means to give the commonwealth its rights by solemn *matter of record*, without which it can in general neither take nor part from anything, at least *estates of freehold*.

The inquisition, for *want of heirs* of the person last seised, vests the possession in the commonwealth immediately, *if the possession be vacant*, but not otherwise. In case of any adversary possession the commonwealth's officers must enter, in order to give her possession. And even when the possession is *vacant*, the land does not *per se* vest in the commonwealth until the inquisition is duly recorded, according to law. (Commonwealth v. Hite, 6 Leigh, 588.)

3°. Writ of *Scire Facias*.

When the commonwealth has unadvisedly granted anything by letters patent contrary to law, or in consequence of fraud or misrepresentation on the part of the grantee, or where the grantee has done an act that amounts to a forfeiture of the grant, the commonwealth itself, or any person injured, may, in the name of the commonwealth, sue out a writ of *scire facias* in chancery to repeal the patent. (3 Bl. Com. 260-'61.) In Virginia, in the case of commonwealth's *grants of lands* at least, the proceeding may be by *bill in equity*. (V. C. 1873, c. 102, § 71 to 73; White v. Jones, 1 Wash. 118; Whittington v. Christian,

2 Rand. 353; *Warwick v. Norvell*, 1 Rob. 308; *Goodwin v. McCluer*, 3 Grat. 291, 298; *Hagan v. Wardons*, 3 Grat. 315; *Blackenpickler v. Anderson*, 16 Grat. 62.) If, indeed, the grant is not merely voidable, but *void*, because the State has no title, or the officer no authority, or the grantee is dead at the time the patent issued, no previous resort to a court of chancery to cancel it is necessary; but a court of law may, in any action thereon, where its validity comes in question, pronounce it void. (*Polk v. Wendal*, 9 Cr. 87; *S. C. 5 Wheat. 298*; *Patterson v. Winn*, 11 Wheat. 380; *Blackenpickler v. Anderson*, 16 Grat. 62.)

4°. Information of *Intrusion of Debt, or In rem*.

An information in behalf of the commonwealth may be filed by the commonwealth's attorney, who "gives the court to understand and be informed of" the matter in question, upon which the party is put to answer, and trial is had as in suits between subject and subject. The most usual informations are those of *intrusion* and *debt*; *intrusion* for any trespass committed on the commonwealth's lands, as by entering thereon without title, holding over after a lease is determined, taking the profits, cutting down timber, and the like; and *debt* upon any contract for monies due the commonwealth, or for any forfeitures accruing to it by the breach of penal statutes; most usually a statute *relating to the revenue*; mere matters of police and public convenience being for the most part left to be prosecuted in the regular way, by those interested. The information *in rem* is where goods are claimed to belong to the commonwealth, and no man appears to dispute the commonwealth's title. In England, the proceeding occurs in respect of forfeitures inflicted for breach of the *excise or customs laws*, (3 Bl. Com. 261-'2); and in the United States, for breach of the United States laws of trade, navigation and revenue. (*Benedict's Adm. 7*, § 301 & seq; *Yeaton & als v. U. States*, 5 Cr. 281; *Harford v. U. States*, 8 Cr. 109; *U. States v. 350 Chests of Tea*, 12 Wheat. 486; *Bollinger's Champagne*, 3 Wal. 560.)

5°. Writ of *Quo Warranto*.

The writ of *quo warranto* is a writ for the commonwealth against one who claims or usurps any office or franchise, to enquire by what authority he supports his claim, in order to determine the right. It lies also in case of *non-user* or long neglect of a franchise, or *mis-user* or abuse of it. In case of judgment for the defendant, he shall have an allowance of his franchise or office; but in case of judgment for the commonwealth, for that the defendant is not entitled to such franchise or office; or hath disused or abused it, the franchise is either seized into the

hands of the commonwealth, to be granted out again at its pleasure, or if it be not such a franchise as may subsist in the hands of the commonwealth, and always in case of *an office* there is merely judgment of *ouster*, to turn out the party who usurped it. (3 Bl. Com. 262-'3; Bac. Abr. Information, (A).)

The judgment on a writ of *quo warranto*, (which is in the nature of a *writ of right*), is final and conclusive even against the commonwealth; which, together with the length of its process, has led to the introduction of a more modern method of procedure *by information*, filed by the attorney for the commonwealth, upon his own motion, or *upon the relation* of another person, in the nature of a writ of *quo warranto*; wherein the process is speedier, and the judgment not quite so decisive. The writ of *quo warranto*, or the *information* in the nature of a writ of *quo warranto*, is originally a criminal method of prosecution, as well to punish the usurper by fine for the usurpation of the office or franchise, as to oust him therefrom; but it has so long been applied to the mere purpose of *trying the civil right*, and ousting the wrongful possessor, that it has lost its criminal character altogether, and, therefore, is not barred by the limitation imposed on criminal or penal proceedings. (3 Bl. Com. 263; Comm'th v. Birchett, 2 Va. Cas. 51; Comm'th v. Jas. Riv. Co. 2 Va. Cas. 191; Bac. Abr. Informations, (A);) Com. Dig. *Quo Warranto*; High on Extraord. Rems. § 591 & seq.)

The case of Comm'th v. Birchett, 2 Va. Cas. 51, was the case of an *office* alleged to have been usurped; and that of Comm'th v. Jas. Riv. Co. Id. 191, 196, the case of a *franchise* claimed to have been forfeited.

6°. Writ of *Mandamus*.

The writ of *mandamus* is employed, as we have seen, to compel the doing of some *ministerial act* when there is *no other adequate remedy therefor*, and where, in justice and good government, there ought to be one. (3 Bl. Com. 110, 264-'5; Parker v. Judges, 12 Wheat. 561; Bac. Abr. *Mandamus*, (A) and (C); High on Extraord'y Rems. § 1 & seq; *Ante*, p. 327, &c.)

It lies to compel a court or public officer to do a *ministerial act*, or to compel a corporation to admit one to an office in it which is not held *durante bene placito*, or in short, to compel the doing of anything *not judicial*, which relates to the public service, or directly concerns the administration of justice. (Bac. Abr. *Mandamus*, (C); High on Extraord'y Rems. § 3 & seq.)

Thus, in Virginia, a writ of *mandamus* is a proper remedy to compel a county court to unite with the court of

another county in constructing a *bridge between the two counties*, (V. C. 1873, c. 52, § 48), or to *erect a bridge* entirely within the limits of the same county, (Brandon v. Chesterfield Justs. 5 Call. 548; Com'th v. Fairfax Justs. 2 Va. Cas. 9; Com'th v. Kanawha Justs. Id. 499; Sampson v. Goochland Justs. 5 Grat. 241); or to admit a deed to record, (Dawson v. Thurston, 2 H. & M. 132; Manns v. Gwins, 7 Leigh, 689; Randolph Justs. v. Stalnaker, 13 Grat. 523); or to admit a justice of the peace to qualify and to exercise his office, if legally entitled so to do, (Chew v. Spottsylvania Justs. 2 Va. Cas. 208; Amory v. Gloucester Justs. Id. 523); or when the oath of insolvency was provided for by law to compel the proper officers, (*e. g.*, a justice of the peace), to administer it, and to discharge the insolvent from custody, (Harrison v. Norfolk Justices, 2 Leigh, 764); or to compel a justice of the peace to allow an appeal from his decision, (*Ex-parte* Morris, 11 Grat. 292); or to compel the county court to carry into effect the law in relation to sales of lands for taxes, (Delaney v. Goddin, 12 Grat. 266); or to admit to record a survey on a sale for taxes, (Randolph Justs. v. Stalnaker, 13 Grat. 523); or to restore a bank-officer to his post, (Booker v. Young, 12 Grat. 303); or to compel a flour inspector to employ, for the purpose of inspection, an auger of the dimensions prescribed, that is, not exceeding *half an inch*, (Delaplane v. Crenshaw, 15 Grat. 457); or to restore an attorney illegally disbarred, (*Ex-parte* Bradley, 7 Wal. 364; *Ex-parte* Robinson, 19 Wal. 513); or to compel a municipal corporation to levy taxes to pay a debt ascertained and funded, (City of Galena v. Amy, 5 Wal. 705); or to compel an executive officer of the State to do a ministerial act, (Robinson v. Second Auditor, 24 Grat. 319); or to compel a *circuit court judge* to hear and decide a cause which he is by law required to *hear and decide*, (Cowan v. Doddridge, 22 Grat. 458; S. P. Cowan v. Fulton, Judge, 23 Grat. 584 & seq; *Ex-parte* Yerger, 11 Grat. 655, 663, 664; Kent & als v. Dickinson, Judge, 25 Grat. 822; *Ex-parte* Newman, 14 Wal. 152; King v. Justices of Kent, 14 East. 395); or to re-instate a cause erroneously dismissed, (*Ex-parte* Bradstreet, 7 Pet. 634; Cowan v. Doddridge, 22 Grat. 458, &c.); or probably to compel an inferior court to sign a bill of exceptions, but with many qualifications. (Taliaferro v. Franklin, 1 Grat. 332, 336, 338; *Ex-parte* Crane, 5 Pet. 190, 192; High on Extraord'y Rems. § 199, 200 & seq; *Ante*, p. 329, & seq.)

But on the other hand, a *mandamus* does *not lie* to compel a change in the *judgment of a court*, and, therefore, not to the circuit court for refusing a *supersedeas* to a judgment of a county court, the proper remedy being a *su-*

per se obtained from the court of appeals, (*Mayo v. Clark*, 2 Call. 276); nor for the same reason to a county court for refusing to *open a new road*, (*Jones v. Stafford Justs.* 1 Leigh, 584), a case which casts doubt upon the propriety of granting a *mandamus* to compel the erection of a bridge upon a public road, *within the limits of the county*, as held in *Chesterfield Justs. v. Brandon*, 5 Call. 548. Neither does a *mandamus* lie against the visitors of a private eleemosynary institution for any matter relating to its internal administration, because such things are committed *exclusively* to the *discretion of the visitors*, without appeal therefrom, (*Bracken v. Wm. & M. Coll.* 3 Call. 573; *Bac. Abr. Mandamus*, (C), 2); nor for the same reason to compel a county court to grant a license to keep a tavern, that being *exclusively* committed to the discretion of that court, (*Ex parte Yerger*, 11 Grat. 655; *Sights v. Yarnall*, 12 Grat. 292; *French v. Noel*, 22 Grat. 454); nor to compel the levy of a tax on the county to pay for a bridge, because the law did then allow another, and an adequate remedy therefor, by action against the justices individually, (*King Wm. Justs. v. Munday*, 2 Leigh, 165); nor for the same reason to compel a court to set aside a judgment, correcting a supposed error at the rules in the clerk's office, (*Ex parte Goolsby*, 2 Grat. 575; *Ex parte Newman*, 14 Wal. 152); nor in any case where there is *any other adequate legal remedy*. (*Bac. Abr. Mandamus*, (C), 2; *Ex parte Hoyt*, 13 Pet. 279; *Ante*, p. 329, & seq.; *High on Extraord'y Remedies*, § 80 & seq.)

The proceedings in a writ of *mandamus* are set forth at large in the statute upon the subject. (V. C. 1873, c. 151, § 1 & seq. See 2 Rob. Pr. (2nd ed.) 573; 3 Id. 341; *High on Extraord'y Rems.* § 498 & seq; *Ante*, p. 328 & seq.)

SECTION IV.

4^b. Limitations to Remedies *in point of Time*; W. O.

1^o. The Limitation to Remedies *in point of Time*, at *Common Law*.

The common law prescribes to remedies no limitation whatsoever, except such as may arise after the lapse of twenty years from the *presumption of satisfaction*, &c., which may be repelled by proof that the claim had neither been satisfied nor relinquished. Thus, a presumption of payment of a debt may be repelled by the debtor's *direct acknowledgment* of the debt as a subsisting demand, within the twenty years. (*Eustace v. Gaskins*, 1 Wash. 188; *Mulliday v. Machir*, 4 Grat. 1; *Bailey v. Jackson*, 16 Johns. (N. Y.) 210; 1 Rob. Pr. (1st ed.) 113-'14); or by the debtor's indirect acknowledgment, arising from his having made a payment on the demand of

the interest, or a part of the principal, within twenty years, which payment may be proved by a witness who is cognizant of it, or by an endorsement of the credit made *by the creditor* on the bond, &c., *provided* it is caused to appear that the endorsement was made *before* the presumption of satisfaction arose; that is, within the twenty years, when the admission of such payment was *against the interest* of the creditor. (Rose v. Bryant, 2 Campb. 321; Rosenboom v. Billington, 17 Johns. (N. Y. 182; Dabney v. Dabney, 2 Rob. 622; 1 Rob. Pr. (1st ed.) 114.) In Dabney v. Dabney, 2 Rob. 622, the proof that the endorsement of the credit was made within the twenty years, consisted in the fact that the endorsement was in the handwriting of the creditor, *who died before the lapse of twenty years* from the time when the money was due. But the *date of the endorsement*, if any appears, can never be invoked to prove *when* the endorsement was made; for the endorsement is not evidence for any purpose until it is proved to have been made *within the twenty years*. (Wilcox v. Pearman, 9 Leigh, 144.)

The presumption of payment may also be repelled by showing that *during the twenty years* a state of war existed, in which the plaintiff, being an *alien enemy*, a payment would have been illegal on the part of the debtor, and so is not to be presumed, (Dunlop & Co. v. Ball, 2 Cr. 180; Bailey v. Jackson, 16 John. 210; 1 Rob. Pr. (1st ed.) 114); or that the defendant had removed to another country, and that his residence was unknown to the creditor (Bailey v. Jackson, 16 Johns. 210); or that the debtor amused the creditor, and put him off with promises to provide for him by will, (Eustace v. Gaskins, 1 Wash. 188; 1 Rob. Pr. (1st ed.) 113); or that the collection of the debt had been suspended by *injunction*, (Hutsonpiller's Adm'r v. Stover's Adm'r, 12 Grat. 579); or that the debtor, who was a purchaser of land subject to a lien, was not aware of the lien save for *less than twenty years*, (Erskine v. North, 14 Grat. 60.)

See Wells v. Washington, 6 Munf. 532; Tomlin v. How, Gilmer, 8; 1 Robt. Pr. (1st ed.) 114; Payne v. Dudley, 1 Wash. 198; Ross v. Darby, 4 Munf. 428; 1 Greenl. Evid. § 39; 2 Insts. Com. & Stat. Law, 348, 328.

2°. Limitations to Remedies by Statute; W. C.

The discussion of the limitations to remedies, as prescribed by statute, will lead us to advert to, (1), The first general statute of limitations in England; (2), The foundation of the policy of the statute of limitations; and (3), The outline of the Virginia statute of limitations;

W. C.

1°. The first General Statute of Limitations in England.

So early as the twelfth century, probably by a *non-actant*

statute or ordinance, a limitation was imposed on *writs of right*, namely, from 1 Hen. I, (A. D. 1100); then by the statute of Merton, (20 Hen. III, c. 8), the limitation was dated from 1 Hen. II, (A. D. 1154); and afterwards by 3 Edw. I, c. 39, and 13 Edw. I, c. 40, it was brought down to 1 Ric. I, (A. D. 1189). By the next statute, which, however, was not until 32 Hen. VIII, c. 2, (A. D. 1541), a *period of years* was adopted as the standard of limitation, and not a *fixed era* as before, and was applied not to *writs of right* alone, but to most *real actions* as well.

But it was not until 21 Jac. I, c. 16, (A. D. 1624), that a *general statute of limitations*, applicable to most if not all actions for lands, and to many, but by no means to all, of the personal actions, was enacted in England. Thus, that statute did not mention, and, therefore, did not include *actions of covenant* at all, nor any *action of debt* on a sealed instrument; nor did it apply to any *proceedings in equity*. Hence, under that statute, which continued to be the law, both in England and in Virginia, until a comparatively recent period, there was *no statutory limitation* to an action of *covenant*, or of *debt on a bond*, or to any *proceeding exclusively equitable*.

2^d. The Foundation of the Policy of Statute of Limitations.

Opinions have not been uniform as to the policy which dictated the statute of limitations, whether it was, (1), The *presumption of satisfaction*, as claimed by Lord Mansfield; or (2), The policy of *repose*, as insisted on by another class of expounders, at the head of whom was Lord Chief-Justice Best;

W. C.

1^o. Lord Mansfield's View of the Policy.

Lord Mansfield conceived that the statute was founded on a statutory *presumption of satisfaction*, at least in the case of demands for money in the nature of debts; the period being *shortened* by the terms of the statute, from twenty to six years. Hence, he held that the bar of the statute as to *promises to pay money*, was repelled by any *proof of non-satisfaction*. Thus, if defendant was asked to pay, and refused on the ground that more than six years had elapsed. Lord Mansfield held, logically enough from his stand-point, that as there was a clear acknowledgment of the debt, the presumption of satisfaction was repelled, and that the defendant's declaration that he *would not pay* was as impertinent as it was dishonest, for that the law *implied* a promise, or rather that the old promise was in its original force.

The conclusions legitimately deduced from Lord Mansfield's view of the policy of the statute, gave rise to much

dissatisfaction, which at length found a distinct patron and mouth-piece in Lord Chief-Justice Best.

2°. Lord Chief-Justice Best's View of the Policy of the Statute of Limitations.

Lord Chief-Justice Best conceived that the statute of limitations was intended by the legislature as a *statute of repose*; and to that end prescribed a limit in *point of time* to the several remedies, whether the demand were satisfied or not. Hence he held that the bar of the statute, as to promises to *pay money*, could be repelled only by proof of *a new promise*.

It is manifest that, upon Lord Mansfield's theory of the statute, the action ought always to be upon the original promise, and not upon the new; and that, although the new promise was *conditional*, there was no need to aver or to prove the fulfilment of the condition; for the promise to pay, how conditional soever, in general must destroy the presumption of satisfaction, leaving the original demand in full force and vigor. On the other hand, upon the theory of Chief Justice Best, the action could never be founded on the old promise, for that was finally and forever extinguished by the lapse of the prescribed time; and if there were any cause of action at all, it must be *on the new promise*; and consequently, if that were conditional, it was indispensable, as in all other cases of promise on condition, to aver and prove a compliance with the condition.

Had the two theories been kept distinct, there would have resulted two lines of decision, irreconcilably in conflict, of course, but without engendering any confusion of thought, or any interlocking of adjudications. If a judge were a follower of Lord Mansfield, his adjustment of most questions connected with the statute might have been foreshadowed without danger of mistake; and if he belonged to the *Best party*, the tenor of his adjudications might be anticipated with no less certainty. Unfortunately, however, the point of divergence was not precisely marked in the minds of most judges; and not recognizing where they belonged, or from which of the two standpoints they proposed to view the statute, the whole doctrine touching the statute of limitations became incongruous and mis-shapen, distressing to suitors who knew not what justice or injustice to expect, inexpressibly annoying to counsel, who could extract no uniform rule from the decisions, and knew not how to advise, and in short, the *opprobrium* of the law.

To this point the mischief had come, when in 1829, Lord Tenderden's act (9 Geo. IV, c. 14), essayed to provide a remedy. The trouble, it will be observed, arose not out of any frauds or perjuries committed or attempted by parties

or witnesses, but from a diversity of opinion in the judicial leaders, (of which the rank and file of the followers had, in a degree, lost sight), as to the *true policy of the statute*. It would seem, therefore, that a single line of enactment, declaring what that policy should thenceforth be understood to be,—whether *presumption of satisfaction*, or for the *sake of repose, to prevent suits well or ill-founded, after the time limited*,—would have quieted the strife, and compelled order out of chaos. It pleased Lord Tenderden, however, who was one of the ablest, and perhaps the most distinguished common law jurist of his time, to resolve the difficulty in another way. He treated it as demanding *another section of the statute of frauds*, and made his leading provision enact that, in “actions of debt, or upon the case, grounded upon any simple contract, no acknowledgment *by words only* shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the said enactments, or either of them, or to deprive any party of the benefit thereof, unless such *acknowledgment or promise* shall be made or contained by or in *some writing, to be signed* by the party chargeable thereby, &c.”

The effect of this statute, whereby, it will be observed, no essay was made to determine *the policy of the law*, which constituted the source of the dispute, was for a time to augment rather than to circumscribe litigation; although in the sequel, it has certainly lessened the number of cases coming into the courts; but it may well be doubted whether it has not done so at the expense of justice to creditors, and at the cost of not a little encouragement of knavery in debtors.

3^d. The Outline of the *Virginia Statute of Limitation*.

This statute is singularly well conceived and expressed. It applies to *all actions at law*, real and personal, and to a very limited extent to *proceedings in equity*. It seems to contemplate the policy contended for by Lord Chief Justice Best, that the statute shall be a *statute of repose*, and *not of presumption*; but it does not say so in terms, and one of its provisions is inconsistent therewith, namely, a provision allowing an action *either upon the old promise or the new*; which, however, is also equally inconsistent with Lord Mansfield's theory. It adopts the general scheme of Lord Tenderden's act, that is, to require the *new promise to be in writing*, but improves upon that law in the details. (*Riddlebarger v. Hartford Ins. Co.* 7 Wal. 321; *Weber v. Harb. Comm'rs*, 18 Wal. 70, V. C. 1873, c. 146.)

The outline of the Virginia statute of limitations may be arranged under the heads following, namely: (1), The cases

to which a limitation is applied; (2), The periods of limitation prescribed; (3), The modes of repelling or qualifying the limitations of the statute; and (4), the application of the statute to rights or causes of action existing when it took effect, 1st July, 1850.

W. C.

1°. Cases to which a Limitation is Applied in Virginia;
W. C.

1^f. Entries on Land, and Actions therefor.

See V. C. 1873, c. 146, § 1 to 5.

2^f. Personal Actions of all kinds, including Writs of *Scire Facias*.

See V. C. 1873, c. 146, § 8 to 15.

3^f. Proceedings by Creditors, to avoid Voluntary Conveyance.

See V. C. 1873, c. 146, § 16.

4^f. Bills in Equity to Repeal Commonwealth's Grants.

See V. C. 1873, c. 146, § 17.

5^f. Sundry Instances of Limitations Contained in Statutes other than the Statute of Limitations; W. C.

1^s. Distresses.

Limited to five years. (V. C. 1873, c. 134, § 10.)

2^s. Appeals.

Limited to two years. (V. C. 1873, c. 178, § 3; *Rogers v. Strother*, 27 Grat. 417; *Calloway v. Harding*, 23 Grat. 542.)

3^s. Bills of Review.

Limited to three years. (V. C. 1873, c. 175, § 5.)

4^s. Motion against Officer for Failure to Return Execution.

Limited to ten years. (V. C. 1873, c. 182, § 14.)

2°. Periods of Limitation Prescribed by the Statute of Limitations.

The periods of limitation prescribed by the statute relate to, (1), Entries on lands, and actions therefor; (2), Personal actions, including writs of *scire facias*; (3), Creditor's impeachment of a debtor's voluntary conveyance; and (4), Bills in equity to repeal commonwealth's grants;

W. C.

1^f. For Entries on Lands, and Actions therefor; W. C.

1^s. Writ of Forcible Entry, &c.

Limited to three years after such forcible entry, &c.
(V. C. 1873, c. 130, § 1.)

2^s. Entry on, and Actions for Lands, other than Forcible Entry.

Limited to fifteen years east and ten years west of the Alleghany mountains, after the right accrued. (V. C. 1873, c. 146, § 1.)

2^f. For *Personal Actions*, including Writs of *Scire Facias*;

W. C.

1^a. For Actions to *Recover Money on an Award or Contract*, other than a Judgment or Recognizance; W. C.

1^b. Action on *Indemnifying or Fiduciary Bonds*.

Ten years from the *right accrued*. And the right is construed to accrue, in case of *guardians*, when the *ward attains his age*, or the wardship otherwise ends; and in case of *personal representatives*, at the return-day of the execution, or from the time of the right to require payment or delivery of the estate, upon the order of the court, acting upon the fiduciary's account of his administration. (V. C. 1873, c. 146, § 6; *Franklin's Adm'r v. Depriest*, 13 Grat. 257.)

This limitation does not apply where the fiduciary himself, or his representatives, are sought to be charged, *not on his bond*, but upon their common law liability for the due discharge of the trust committed to them.

But the limitation is always applicable to suits *against his sureties*, who cannot be charged otherwise than on the bond. (V. C. 1873, c. 146, § 9.)

2^b. Actions on *other Contracts under Seal*.

Limited to *twenty years* from the time of the *right accrued*. (V. C. 1873, c. 146, § 9.)

3^b. Actions on *any other Contract, or on an Award*, except for *articles charged in a store account*.

Limited to *five years* from the right accrued; and the right is deemed to have accrued, in case of an action *by a partner against a co-partner*, for a settlement of the partnership accounts; or in case of actions *upon accounts concerning the trade of merchandise* between merchant and merchant, their factors and servants, where the *action of account would lie*, upon the *cessation of dealings* in which they are interested together. (V. C. 1873, c. 146, § 8; *Watson v. Lyle*, 4 Leigh, 238; *Marceller v. Weaver*, 1 Grat. 391; *Coalter v. Coalter*, 1 Rob. 79, 83; *Foster v. Rison & al*, 17 Grat. 334 & seq.)

4^b. Actions for *articles charged in a store account*.

Limited to *two years* after the right accrued. (V. C. 1873, c. 146, § 8.)

This limitation applies only to *retail store accounts*, (*Tomlin & als v. Kelly*, 1 Wash. 190), and only to promises *implied*, and never where there is any *express promise*, the limitation in the latter case, (supposing the promise to be *not under seal*), being five years, (*Beall v. Edmundson*, 3 Call. 514, 520; *Wortham & Co. v. Smith & als*, 18 Grat. 496-'7, 492-'3.)

2^a. For Writs of *Scire Facias*, actions on Judgments and Recognizances.

Limited to *ten years*. (V. C. 1873, c. 146, § 13; V. C. 1873, c. 182, § 12, 13.)

In case of foreign judgments, the limitation in the Virginia courts is the period prescribed where the judgment *was rendered*, so as in no case to *exceed ten years*; thus creating by statute an exception to the general doctrine of the common law, that *remedies*, (including limitations thereon), are governed by the *lex fori*. (V. C. 1873, c. 146, § 15.)

3^d. For any other Personal Actions, *not otherwise limited*; W. C.

1^b. Where the Action *is revivable* against Defendant's Personal Representative.

Limited to *five years* from the right accrued. (V. C. 1873, c. 146, § 14. But see V. C. 1873, c. 145, § 7 & seq.)

It will be observed, that all actions *ex contractu* are thus revivable; and also all actions *ex delicto*, where the injury complained of relates *to the property*. But where it relates *to the person only*, (as slander, assault, &c.), it is not revivable. (V. C. 1873, c. 126, § 19 to 21. But see V. C. 1873, c. 145, § 10.)

2^b. Where the Action *is not revivable* against Defendant's Personal Representatives.

Limited to *one year* from the right accrued. (V. C. 1873, c. 146, § 14.)

4^d. Doctrine as to what Law of Limitations applies when a Party is sued on a cause of Action *accruing in another country*; W. C.

1^b. Doctrine at *Common Law*.

Whatever concerns the *rights of parties*, especially in matters of contract, is governed by the *lex loci contractus*, (the law of the place with reference to which the contract is made), whilst what concerns the *remedy* is controlled by the *lex fori*. Hence, at common law, whatever relates to the limitation, (being immediately concerned with the remedy), is determined by the *lex fori*. (Jones v. Hook, 2 Rand. 303; Bk. of U. States v. Donnally, 8 Pet. 372; Stor. Conf. L. § 558, &c., § 577, &c.)

2^b. Doctrine by *Statute in Virginia*.

The *lex loci contractus* determines the limitation when the contract *is made*, and is *to be performed in another country* by one *then resident therein*. (V. C. 1873, c. 146, § 20.)

3^d. For Creditor's Impeachment of a *Voluntary Conveyance*, by Bill, Distress, or Execution.

Limited by statute in Virginia, to *five years* from the *making of the conveyance*. (V. C. 1873, c. 146, § 16.)

This limitation applies where the conveyance is impeached simply *because it is voluntary*. If it be impeached for *actual fraud* (of which its voluntary character may be a partial proof,) this provision is not applicable, nor is there in such case *any statutory limitation*. (Snoddy v. Haskins, 12 Grat. 363.)

4^t. For Bill in Equity to Repeal Commonwealth's Grants.

Limited by statute to *ten years* from the date of the grant. (V. C. 1873, c. 146, § 17.)

3^d. Modes of Repelling or Qualifying the Limitations of the Statute.

The limitations prescribed by the statute may be repelled or qualified by either of the following circumstances, namely: (1), The subsequent acknowledgment or promise *to pay money*, being *in writing*, &c.; (2), The existence of *certain disabilities* on the part of the *plaintiff*; (3), Certain attempts on the part of the defendant to *evade the action*; and (4), The *failure of a suit* commenced in due time;

W. C.

1^t. The subsequent acknowledgment, or promise *to pay money*.

The subsequent promise or acknowledgment, *from which a promise may be implied*, relates only to awards or contracts *for the payment of money*; and in order to repel the limitation imposed by the statute, the promise or acknowledgment must be *in writing*, signed by the defendant or his agent. (V. C. 1873, c. 146, § 10.) And it must be a promise *to pay a debt*, or a distinct acknowledgment that a *definite amount* is due. A promise *to settle*, or an acknowledgment that *something is due*, but designating no certain amount, although it be in writing, will not repel the statute. (Bell v. Morrison, 1 Pet. 351; Ayletts v. Robinson, 9 Leigh, 45; Sutton v. Burruss, 9 Leigh, 381; Bell v. Crawford, 8 Grat. 123; Tazewell v. Whittle, 13 Grat. 329, 348;)

W. C.

1st. The time within which an Action may be brought after such new Promise or Acknowledgment.

The plaintiff may sue on such new promise or acknowledgment *within the same time thereafter*, as upon the original award or contract. (V. C. 1873, c. 146, § 10.)

2^d. The Mode of suing where there is such subsequent Promise, &c.

The action (says the statute) may be either *on the new promise*, or on the *old promise or award*; and in the latter case, if the statute be pleaded, the plaintiff may reply, stating such promise, and that the action was

brought within the prescribed number of years thereafter. (V. C. 1873, c. 146, § 10.)

This proviso is not consistent with the apparent policy of the statute, which seems to be founded on Lord Chief Justice Best's view, that it is a *statute of repose*. According to that view, the right of action upon the original cause is *extinguished* by the lapse of time, and the new promise, &c., does not revive it, but constitutes a *new cause of action*. To be in accord, therefore, with Chief-Justice Best's doctrine, the action ought to be brought *upon the new promise, &c., alone*.

3^s. The Effect of the new Promise or Acknowledgment.

The statute enacts that no promise or acknowledgment by a *personal representative*, or by *one of two or more joint contractors*, shall repel the bar of the statute as to the estate of the decedent, or as to another of such contractors. (V. C. 1873, c. 146, § 10.)

This provision is taken from 9 Geo. IV, c. 14 (Lord Tentenden's act), and was one of the best conceived of the several enactments of that statute, as preventive of litigation, and giving due effect to the bar of the statute. Prior to the adoption of the provision it was held, for the most part, both in England and the United States, (and in logical conformity to Lord Mansfield's doctrine, but not to that of Lord Chief Justice Best), that wherever the bar of the statute was repelled in any manner, the old cause of action *was revived*, and the revival was, of course, applicable to all the original parties. Hence, a promise by a personal representative revived the action against the decedent's estate, and a promise by one of several *joint contractors* revived the promise against all. This principle seems to have been admitted in general with considerable unanimity, as well in the United States as in England, (*Whitcombe v. Whiting*, 2 Dougl. 452; *Pecham v. Raynal*, 2 Bingh. (9 E. C. L.) 306; *Chippendale v. Thurston*, 4 Carr & P. (19 E. C. L.) 98; *Martin v. Bridges & al*, 3 Carr. & P. (14 E. C. L.) 88; *Hunt v. Bridgham*, 2 Pick, 581; *Johnson v. Beardslee*, 15 Johns. (N. Y.) 3; 1 Rob. Pr. (1st ed.) 95 & seq.) When the joint-promisors were *partners*, and the new promise was made by one of the partners *after dissolution*, there was more diversity of opinion. The new promise, made after dissolution by one of the partners, was denied the effect of reviving the claim against the co-partner, by the supreme court of the United States, in *Bell v. Morrison*, 1 Pet. 373, and in some of the States; whilst it was held to have that effect in England, in *Wood v.*

Braddick, 1 Taunt. 104; and in Virginia, in *Garland v. Agee's Adm'r*, 7 Leigh, 362.

The enactment referred to put an end to all question upon the subject.

The *existence* of the old demand is not determined by the lapse of the period prescribed. It is only the *right of action* which is taken away. Hence the old debt constitutes a sufficient valuable consideration for the new promise. (*Wetzell v. Bussard*, 11 Wheat. 309, per Marshall, C. J.)

4^s. The Effect of a Provision in a Decedent's Will *directing the Payment of his Debts*.

No provision in a will devising real estate subject to, or charging it with debts, shall prevent the statute from applying to such debts, unless such appear *plainly to be the testator's intent*. (V. C. 1873, c. 146, § 12.)

Previous to the enactment of this statute, it had been pretty clearly established, that a *general* direction in a will of *personal estate* to pay debts will not stop the running of the statute of limitations, or if the bar has already attached, remove it, because thereby *no trust* is created which does not exist independently of the will; but where a will *charged lands* with the payment of *debts generally*, (as independently of the will they were not so chargeable,) *a trust was thereby created*, and the question was, whether the statute was repelled by such a devise, even as against debts *barred at the time of the testator's death*, or only as against claims not then so barred. A loose idea prevailed very generally that the devise repelled the application of the statute, even as to debts *barred at the testator's death*. Thus, we have *dicta* to that effect from Lord Mansfield, in *Trueman v. Fenton*, Cowp. 548, and from many other English judges of eminence; and also from our own court of appeals, in *Chandler's Ex'x v. Hill*, 2 H. & M. 130; and an actual decision by the latter court, in *Lewis' Ex. v. Bacon*, 3 H. & M. 109, 114; although, at a subsequent time, in *Brown's Adm'r v. Griffith*, 6 Munf. 450, the same court expressly reserved its judgment on that point. But after an exhaustive review of all the cases and *dicta* upon the subject, in *Burke v. Jones*, 2 Ves. & B. 278 & seq, Sir Thomas Plummer, Vice-Chancellor, came to the conclusion (it would seem with the approval of the Chancellor, Lord Eldon, and of Lord Redesdale, the Chancellor of Ireland,) that a devise of lands in trust for, or charged with, the payment of debts, does not revive a debt upon which the statute of limitations had taken effect, by the lapse of the period prescribed before the testator's death.

And this seems to have been the doctrine currently received at the time the provision now under consideration was introduced. (2 Stor. Eq. § 1521 a; 2 Lom. Ex. 665; *Hughes v. Wynne*, 1 Turn. & Rus. (11 Eng. Ch.) 307; *Ault v. Goodwick*, 4 Rus. (4 Eng. Ch.) 434; *Baylor v. Dejarnette*, 13 Grat. 152; *Tazewell v. Whittle*, 13 Grat. 329, 346 & seq.)

5^s. The Effect of a *Promise on Condition*.

When the new promise is *on condition*, it seems now agreed that there must be an averment and proof of the fulfilment of the condition; not, however, it is presumed, unless the plaintiff sues on the *new promise*, or has occasion to state it, by way of replication, to the plea of the statute. (*Wetzell v. Bussard*, 11 Wheat. 309; *Bell v. Morrison, &c.*, 1 Pet. 357; 1 Rob. Pr. (1st ed.) 93-'4, &c.)

2^f. Disabilities existing in the Plaintiff; W. C.

1^s. What Disabilities qualify the Limitation.

Infancy, coverture and insanity, *existing at the time the right of action accrues*, qualify the limitation imposed by the statute. (V. C. 1873, c. 146, § 4, 18.) But that is because it is expressly so enacted; for where the assertion of rights is limited, no disability prolongs the term, *without a special exemption*. (*Leonard v. Henderson*, 23 Grat. 338.)

2^s. What period is allowed after the Removal of the Disability; W. C.

1^h. What period is allowed in *Personal Actions*.

The same period as is allowed for bringing the same action after the right accrued, but in no case to exceed *twenty years* from the accrual of the right. (V. C. 1873, c. 146, § 18.)

2^h. What period in *Actions for and Entries on Lands*.

Ten years from the *removal* of the disability which existed *when the right accrued*, or *from the death* of the claimant, whichever shall first have happened; so as in no case to exceed *thirty years* from the right *first accrued*. (V. C. 1873, c. 146, § 4, 5.)

But in the writ of *forcible entry, &c.*, no disabilities avail to prolong the time (three years) allowed.

3^s. What Disabilities of Infancy, &c., are to be *Reckoned*.

Those disabilities only which existed *when the cause of action accrued*. (V. C. 1873, c. 146, § 4, 5, 18; *Parsons v. McCracken*, 9 Leigh, 495.)

If one labors under *several disabilities* at the time of the accrual of the right, he may avail himself of that which *continues longest*; but he cannot have the benefit of a disability which *did not exist* at that time, but

supervened afterwards, although it arose before the first disabilities ceased; which is commonly expressed by saying, that when the statute once begins to run, it *runs over all mesne disabilities*, giving no heed thereto. (Hudsons v. Hudsons' Adm'r, 6 Munt. 355; Fitzhugh v. Anderson, 3 H. & M. 306; Markle v. Burch, 11 Grat. 26; Caperton v. Gregory, 11 Grat. 505.) But if there be in being one capable to sue, and assert the rights of the party under disability, the statute runs against the claim, notwithstanding the disability, (Caperton v. Gregory, 11 Grat. 512; Livesay & Helms, 14, Id. 444-5.) Moreover, by agreement between the parties, founded on valuable consideration, the statute may be suspended or arrested after beginning to run. (Irving v. Veitch, 3 M. & W. 90; Bowles v. Elmore, 7 Grat. 385.)

It has long been an established rule that where, when *the action accrues*, there is no one in being *capable to sue*, as for instance where the action accrues after the claimant's death, and no one qualifies as his personal representative, the statute *commences not to run* until there comes into being some one capable of bringing an action, that is, in the case supposed, until *some one qualifies* as the decedent's executor or administrator. (Clark v. Hardiman, 2 Leigh, 347; Hansford v. Elliott, 9 Leigh, 79; Lyon's Adm'r v. Magagnos, 7 Grat. 377; Murray v. E. India Co. 5 B & Ald. (7 E. C. L.) 204; Chit. Cont. 810.) But in Virginia now, by statute, if the person entitled to the action die before the cause of action accrues, and *more than five years* elapse before the qualification of his personal representative, the personal representative shall be deemed to have qualified *on the last day of the five years*. (V. C. 1873, c. 146, § 19.)

3^d. Attempt on the part of the Defendant to *evade the Action*.

If the defendant has before *resided in Virginia*, and by departing therefrom, or by absconding, or concealing himself, or by any *other indirect ways or means* has obstructed the prosecution of the plaintiff's right, the time that such obstruction may have continued shall not be computed as part of the time within which the right ought to have been prosecuted; but this is to apply only as against the party obstructing, and not as to another jointly liable with him. (V. C. 1873, c. 146, § 20.) To bring a case within this exception, it must appear that the complainant was *actually defeated or obstructed* in bringing his action, not merely that he *might have been so* (Wilson v. Koontz, 7 Cr. 202.) It will be observed that the statute contemplates that the defendant shall once

have been *resident in Virginia*, at sometime before the cause of action accrued, and not simply that the cause of action arose in Virginia. Hence, the case of *Wilkinson & Co. v. Holloway*, 7 Leigh, 277, (in which it was held that a citizen and resident of North Carolina, who contracted a debt in Petersburg, Va., and immediately returned to his home in North Carolina, thereby obstructed the plaintiff's remedy, and precluded the defence of the statute,) is no longer maintainable. It would seem, on the other hand, that if a resident of Virginia contemplating removal from the State, should contract a debt before his departure, and then remove, he would come within the purview of this statute; and if so, the case of *Markle's Adm'r v. Burch's Adm'r*, 11 Grat. 26, cannot be sustained.

Suit may be obstructed, not only by removal from the State, or by the defendant's absconding or concealing himself, but if *personal property* is the subject of the demand, by removing it to a *distant county*, or dispersing it in various quarters. (*Rankin v. Bradford, &c.*, 1 Leigh, 163; 1 Rob. Pr. (1st ed.) 108.)

4^c. By Commencement of a Suit in due time, *which fails*.

If an action commenced in due time, in the name of or against several, abate as to one of them, by the return of *no inhabitant*, or by death or marriage; or if judgment for plaintiff, in action commenced in due time, be arrested or reversed, without precluding a new action; or if there be occasion to bring a new suit by reason of the loss or destruction of any of the papers or records, in a former suit, which was in due time; in every such case, notwithstanding the expiration of the time prescribed, a new suit may be brought *within one year* after such abatement, or such arrest or reversal of judgment, or such loss or destruction. (V. C. 1873, c. 146, § 21; *Brown v. Putney*, 1 Wash. 302; *Wilcocks v. Huggins*, 2 Stra. 907.)

This provision does not apply to a case where one sues first in a *court of chancery*, whence he is dismissed for *want of jurisdiction*, (*Gray v. Berryman*, 4 Munf. 181); nor to the case of a suit dismissed for *want of formality*. (*Callis v. Waddy*, 2 Munf. 511.) And the matter must be *specially replied* to a plea of the statute, and cannot be proved under a general replication thereto. (*Bogle v. Conway*, 3 Call. 1.)

The student should observe, that the application of the statute is suspended, and the period not to be computed from April 17th, 1861, to March 2nd, 1866, the date of the act. (V. C. 1873, c. 146, § 6.) And that, by virtue of the *stay-law*, it is further suspended from the 2nd day of March, 1866, (the date of that law), to the 1st day of

January, 1869, when the law expired by its own limitation. (Acts, 1865-'6, p. 183, c. 69, § 7; Acts, 1866-'7, p. 727, c. 297; *Danville Bank v. Waddill*, 27 Grat. 450.)

And also that the rights and remedies saved by the Acts of March 14, 1862, February 23, 1864, and March 11, 1863, of the *Richmond legislature*, during the war, are declared valid. (V. C. 1873, c. 146, § 7; *Johnston v. Gill*, 27 Grat. 587.)

It would seem that allowance should also be made for the continuance by military authority (the *de facto* government), of the *stay-law* from January 1, 1869, when the legislative act expired by limitation, (Acts, 1866-'67, p. 747, c. 297), to the termination of military rule by the adoption of the constitution, January 26, 1870. But the contrary seems to have been determined, or at least to be the opinion of the court of appeals, in *Danville Bank v. Waddill*, 27 Grat. 450; *Johnston v. Gill*, 27 Grat. 593 & seq; and *Sexton v. Crockett & als*, 23 Grat. 880 & seq.

4°. Application of the Statute of Limitations, to Rights existing when it took effect, July 1, 1850.

If a limitation theretofore existed, *that* is to apply to such rights. If no limitation theretofore existed, (as is the case with *specialties generally*), the right of action is to be considered as accruing *July 2, 1850*. (V.C. 1873, c. 146, § 22.)

Having reference to the statutory provision, that the time between April 17, 1861, and March 2, 1866, (four years, eleven months, and fifteen days), is not to be computed, and to the effect of the stay-law which, as we have just seen, omits in the computation the period from March 2, 1866, to January 1, 1869, (two years, nine months, and twenty-nine days), it appears that no *bond, debt*, or *specialty* can be barred sooner than April 16, 1878.

DIVISION IV.

IV. The Pursuit of Remedies by *Action at Common Law*.

The exposition of the doctrines touching the pursuit of remedies will lead to the discussion of remedies by action at common law; of proceedings in courts of probate and administration, and of police and economy, and on motions generally; of proceedings in courts of equity; and of proceedings in courts of admiralty.

The discussion of the pursuit of remedies by action at common law will require, (1), A description of the proceedings in an action at law from beginning to end; and (2), An exposition of the principal rules of pleading;

W. C.

CHAPTER I

1^a. The Proceedings in an Action at Law from *Beginning to End*.

The proceedings in an action at law may be expounded under the heads following, namely, (1), The process whereby defendant is caused to appear; (2), The pleading, and its incidents; (3), The decision of the issue; (4), The judgment; (5), The change of parties by death or marriage, &c.; (6), Causes neglected by the parties; (7), Writs of execution; and (8), Proceedings of an appellate nature;

W. C.

SECTION I.

1^b. The Process to cause Defendant to appear to answer the Complaint.

The process to compel the defendant to appear to answer the complaint, and the doctrines applicable to such process, will best be understood by directing attention to, (1), The nature of the process in the several sorts of action; (2), The form of the process; (3), Whence and how process is obtained; (4), Mode of executing process; (5), Mode of returning process, and the consequences of the several returns; and (6), Rules and rule-days;

W. C.

1^c. The Nature of the Process in the Several Sorts of Actions.

Under this head we are to note, (1), The process to commence actions at common law; and (2), The process employed in Virginia;

W. C.

1^d. Process to *Commence Actions at Common Law*.

By the theory of the common law, the king is the *fountain of justice*, and to him all applications for the redress of wrongs are to be made; not that he does, or ever did hear causes habitually in person, but they are heard by his direction, in whichsoever of the great courts at Westminster he is pleased to appoint.

The suitor may be supposed, in the rude original of the law, to have presented himself with his complaint to the king, who would cause to be issued to him from the office of his *chief secretary*, (that is, from the *court of chancery*), a writ, partly precept, and partly commission, styled an *original*, or sometimes a *remedial writ*, reciting the complaint according to certain technical *formulae*, preserved by the clerks in chancery, and commanding the executive officer (the sheriff) to summon the defendant to answer the complaint in one of the king's courts designated in the writ, on an appointed day, when and where, he is to have the writ, together with his *return* (or *formal report*) of what he has

done in pursuance of the mandate therein contained. The writ being thus returned into the proper court, after fulfilling the function of a *summons* to the defendant, serves as a *commission to the court* to hear and determine the cause. If, as generally happened, the summons contained in the original writ was not obeyed, other writs were issued *by the court* itself to enforce obedience; and because they were awarded by the *judges*, instead of coming from the court of chancery, these were called *judicial writs*, and sometimes distinctively *process*. (3 Bl. Com. 270, 273, &c.; Steph. Pl. 1st Appx. p. ii.)

It will be expedient for the student to read, in this connection, with attention, Blackstone's chapters XVIII and XIX of B. III, in relation to *original writs* and *process*, which will facilitate his apprehension of the whole subject, and acquaint him with its history and development.

2^d. Process to Commence Actions in Virginia.

Let us here take notice of the process in Virginia, in (1), Real actions; (2), Personal actions; (3), Mixed actions; W. C.

1^o. Nature of Process in *Real Actions*.

It will be remembered that real actions are either (1), Possessory; or (2), *Droiturel*; and the exposition of the process is to be distributed accordingly;

W. C.

1^t. Process in *Possessory Actions*; W. C.

1^a. Process in Writs of *Forcible Entry*, &c.

The process is merely a *summons* in the name of the commonwealth, and bearing *teste* (that is, *witnessed* or authenticated), by the clerk of the court, commanding the officer to summon the defendant to answer the complaint of the plaintiff, that the defendant is in possession, and *unlawfully withholds* from the plaintiff the premises in question (describing them), and no other declaration is required. For the most part, the summons issues from, and the proceedings are had in, the *circuit, county, or corporation court*; but in case of the unlawful detainer of premises by a tenant whose lease originally *did not exceed one month*, the summons may be issued by, and the proceedings had before, a *justice of the peace*. When issued from the clerk's office of a court, the summons may be returnable to, and the cause heard and determined *at any term* of the court. It is to be served at least five days before the return-day, and if the defendant appear and plead, his plea shall be "not guilty;" and upon that issue, or upon the return of a summons "executed," the case is to be tried whether the defendant unlawfully withholds the premises in controversy. When

the cause is in court either party may have a jury upon application; and such causes shall have precedence over all other civil causes; but judgment therein does not bar an action of trespass or ejectment between the same parties. (V. C. 1873, c. 130, § 1, 2, 4.) See note (a.)

2^d. Process in a *Writ of Entry*.

The process in a writ of entry is a writ of *præcipe quod reddat*, being a writ in the name of the commonwealth, bearing *teste* by the *clerk of the court*, and addressed to the sheriff or sergeant, commanding him that he “command the defendant to restore to the plaintiff the premises in question, or show at a day appointed why he has not done it,” and the officer is directed when or where he is to make *return* (or report) of what he has done in pursuance of the writ. The form of a writ of *præcipe quod reddat*, commencing a writ of entry, may be seen, 2 Bl. Com. 450, App’x No. 5. See 3 Bl. Com. 278.

The writ of entry, it will be remembered, is abolished in Virginia. (V. C. 1873, c. 131, § 38.)

3^d. The Process in a *Writ of Assize*.

The process to commence a writ of assize is a writ called, from certain significant words in it, *si te fecerit securum*, the nature of which, especially in contrast with the writ of *præcipe quod reddat*, is explained by Blackstone. (3 Bl. Com. 274.) As this is a yet existing form of action amongst us, although unused, it will conduce to clearness of apprehension to state the terms of the writ which commences it, as derived from Fitzherbert’s *Natura Brevium*, 410; (*Ante*, p. 341 & seq; & seq.) See note (b).

NOTE (a). FORM OF SUMMONS IN A WRIT OF FORCIBLE ENTRY, &c.
The Commonwealth of Virginia,

To the Sheriff of A. County, greeting :

We command you that you summon D. D., if he be found within your balliwick, to appear before the judge of our *circuit court*, for our said county, at the court-house thereof, on the first day of the next term, to answer C. C. of a complaint that the said D. D. is in the possession of, and unlawfully withholds from the said C. C., certain premises lying and being in the said county, and [*here describe them as particularly as may be convenient.*] And have then there this writ. Witness B. T., clerk of our said court, at the court-house, this — day of —, in the year of our Lord —, and in the — year of our foundation.

Teste, _____,

B. T., Clerk.

NOTE (b).

The Commonwealth of Virginia,

To the Sheriff of A. County, greeting :

We command you that whereas C. C. hath complained to us that D. D. unjustly and without judgment, hath disseised him of his freehold, in a certain tract of land, called Black-Acre, lying and being in the said county, and bounded. &c., [*describe*

2^d. The Process in *Droiturel Actions*; W. C.1st. Process in the Writ of *Quod ei Deorceat*.

The process which commences the action of *quod ei deorceat* is the writ of *præcipe quod reddat*, which is substantially the same in form as in the writ of entry, *supra*. (3 Bl. Com. 274; 2 Id. 250; Ibid. Appendix, No. V; Fitzh. Nat. Br. 364-'5; *Ante*, p. 342 & seq.)

2nd. Process in the *Writ of Right of Dower*.

The process here is the writ of *præcipe quod reddat*, in form not materially differing from those already mentioned. See the form below in note (c).

See Fitzh. Nat. Br. 18; Glanvil, B. VI, c. V; Steph. Pl. (Tyler,) 45; *Ante*, p. 343.)

3rd. Process in *Writ of Formedon*.

The process to commence the action of *formedon* is the writ of *præcipe quod reddat*, which in form closely resembles the same writ already given, and may be seen in St. Pl. (Tyler,) 44; See 3 Bl. Com. 274, 354; Fitzh. Nat. Br. 487.

The writ of *formedon* is abolished in Virginia. (V. C. 1873, c. 131, § 38; *Ante*, p. 344, 469.)

4th. Process in *Writ of Right*.

the boundaries with all convenient particularity,] if the said O. C. shall make you secure to prosecute his claim, then cause the said tenement to be re-seised, and the chattels which were taken on it, and the same tenement with the chattels to be in peace until the next term of our circuit court for our said county; and in the meantime cause twelve free and lawful men of that venue (vicinetum, neighborhood,) to view that tenement, and their names to be put into the writ, and summon them by good summoners, that they be before the judge of our said circuit court, at the said next term, ready to make recognizance thereupon, and put by gages, and safe-pledges, the aforesaid D. D., that he may be then there to hear that recognizance, &c. And have then there the summoners, the names of the pledges, and this writ. Witness, B. T., clerk of our said court, at the court house, this — day of —, in the year of our Lord —, and in the — year of our foundation.

Teste: _____

B. T., Clerk.

NOTE (c).

The Commonwealth of Virginia,

To the Sheriff of A. County, greeting:

Command D. D. that, justly and without delay, he render unto O. C., late the wife of H. C., deceased, her reasonable dower of one-third, which to her doth belong, of the freeholds of inheritance, which were the said H. C.'s, her late husband, in his life-time, in the said county, whereof it is complained that the said D. D. hath *deforced* her. And unless he shall do so, then summon the said D. D. that he be before the judge of our circuit court for the said county, on the first day of the next term, to show wherefore he hath not done it. And have then there this writ. Witness, B. T., clerk of our said court, this — day of —, in the year of our Lord —, and in the — year of our foundation.

Teste: _____

B. T., Clerk.

The process to commence a *writ of right* is the writ of *precipe quod reddat*, for which, (the form closely resembling those already examined,) see St. Pl. (Tyler,) 44; Rob. Forms, 6; 1 R. C. (1819,) p. 463, c. 118; See 3 Bl. Com. 274 345; *Ante*, p. 344-5.

The writ of right is abolished in Virginia, being substituted in all cases where it formerly lay, by an action of *ejectment*. (V. C. 1873, c. 131, § 38; Id. § 12.)

2°. The Nature of the Process in *Personal Actions*.

Let us notice the process in, (1), Actions *ex contractu*; and (2), Actions *ex delicto*;
W. C.

1°. Process in Actions *Ex Contractu*; W. C.

1°. Writ of Summons.

The usual process wherewith to commence a *personal action*, whether it be *ex contractu* or *ex delicto*, is a writ of summons, commanding the officer to whom it is directed, in the name of the commonwealth, to *summon the defendant* to answer the action. Like all other writs with us, it is required by the constitution to run in the name of the commonwealth, and to bear *teste* by the clerk of the court whence it issues. (V. C. 1873, c. 166, § 5.)

Its form, the manner of obtaining it, and how it is served, with the effect thereof, will appear in the sequel.

It was the design and expectation of the revisors of the Code of 1849, that this should be the *only writ* employed in the initiation of personal actions. They proposed to dispense with all coercive process *against the person* in civil cases, and to depend wholly on that which was directed *against the property*. A very short experience, however, demonstrated that, for the most part, it was vain to seek to reach a fraudulent debtor's property except *through his person*, and, therefore, provision was speedily made to revive the old common law process of *capias ad respondendum*, whenever the circumstances indicated a need therefor, whilst the *writ of summons* was allowed to remain as the *usual* process to be employed. (V. C. 1873, c. 148, § 33.)

2°. Writ of *Capias ad Respondendum*.

Previous to the revival of 1849, the writ of *capias ad respondendum* was the usual process in all kinds of personal actions. It runs in the name of the commonwealth, bearing *teste* by the clerk, and commands the officer to *take the body* of the defendant, and have him before the court on the day appointed, to *answer* the complaint. But notwithstanding such was the precept of the writ, it was really a *process of arrest* in those cases only where

the plaintiff had a right to *demand bail*, either as *of course*, (as in an action of *debt* on a note in writing for the payment of money, in an action of *covenant*, or in an action of *detinue*); or for *special cause* shown by affidavit, (as that defendant was *about to abscond*.) In all other cases the *capias* was merely a *summons*.

The revisors of the code of 1849 proposed to abolish, and did abolish, as we have seen, the writ of *capias ad respondendum* in all cases, and designed to employ, in order to convene parties to answer actions against them, nothing but the *writ of summons*, expecting to secure the *effect of the suit* by laying hold of the *property* of a defaulting debtor, by means of an *attachment*, (V. C. 1873, c. 148, § 1), whenever it should seem to be necessary. The wisdom of the old law, however, which sought to make sure of the debtor's property by arresting his person, was, as has been said, quickly vindicated; and the legislature, ere the lapse of many months, found it necessary to reinstate the writ of *capias ad respondendum*, and that too in the literal acceptation of its terms, as a process of *arrest*, not indeed as before, as *of course*, at the plaintiff's pleasure in any case, but whenever it should be made to appear by affidavit that there was cause for it, the defendant being about to abscond.

Accordingly, it is enacted that, if a plaintiff in any action shall, *by affidavit*, show to the satisfaction of the court in which it is pending, or to any judge or justice of the peace, that he has *cause of action* against the defendant, and that there is probable cause for believing that the defendant is about to *quit this State* unless he be forthwith apprehended, it shall be lawful for such court, judge, or justice to direct that the defendant shall be *held to bail* for such sum as the court, judge, or justice may think fit; and thereupon the plaintiff may sue out of the clerk's office, in such action, a writ of *capias ad respondendum*, against the defendant, to be assimilated as nearly as may be to the form of such writ as it was used prior to 1st July, 1850, (V. C. 1873, c. 148 § 33); but before the writ issues the plaintiff must file in the clerk's office a *bond with good security*, approved by the clerk, in a penalty equal to the sum in which the defendant is directed to be held to bail, payable to defendant, and conditioned to pay him all costs and damages awarded or sustained by reason of defendant's arrest. (V. C. 1873, c. 148, § 39.)

The form of the writ of *capias ad respondendum*, and the mode of proceeding with it, will be traced out subsequently.

3^d. Notice of Motion.

It is not without some impropriety that the *notice* referred to can be denominated *process*; but as it is a mode of commencing an action, and serves to bring the defendant into court, to answer the complaint, (which is the proper function of process), it leads to no practical inconvenience to treat it as such.

The proceeding is confined exclusively to cases arising *ex contractu*. The statute provides that any person entitled to *recover money* by action on *any contract*, on motion before any court which would have jurisdiction of an action (otherwise than because the cause of action arose in that county, &c.), may obtain judgment for such money after *sixty days' notice*, which notice shall be returned to the clerk's office of such court *forty days* before the motion is *heard*; that is, before the *commencement of the term*; for as a *docket* of all the cases for the term, including such motions, is directed by statute to be made by the clerk *before each term*, the forty days must have elapsed when the docket is made up, or else the case in question could not go on it. (V. C. 1873, c. 163, 6); *Hale v. Chamberlain*, &c. 13 Grat. 660. See *Davis v. Com'th*, 16 Grat. 136.)

2^d. The Process in Actions *ex Delicto*; W. C.1st. Writ of Summons.

See the observations made, *supra* p. 521.

2^d. Writ of *Capias ad Respondendum*.

See the observations, *supra* p. 521-'2.

The proceeding *by motion*, as already stated, is confined to cases *ex contractu*. See *supra*.

3^d. The Nature of the Process in *Mixed Actions*; W. C.1st. The Process in *Ejectment*.

As *ejectment*, in its nature and origin, is a personal action *ex delicto*, of trespass *vi et armis*, one might expect that process would be employed appropriate to the last-named action, and so at first it was; but the remedy having been subjected to considerable modifications, in order to adapt it to the recovery of lands, the process has come at length to be nothing but a *notice appended to the declaration*, a copy of which, as well as of *the declaration itself*, is served on the defendant, notifying him when and where the accompanying declaration will be filed. (V. C. 1873, c. 131, § 6, 11.)

2^d. The Process in the *Writ of Waste*.

The process in the writ of waste is first a *summons*, and if that be not obeyed, then follows successively an *attachment*, to take the defendant's person, and so compel his appearance, and a *distress* of his goods, and the profits of

his lands. (3 Bl. Com. 280; Bac. Abr. Waste, (K); 1 Rob. Pr. (1st ed.) 500; Rob. Forms, 4; Fitzh. Nat. Br. 126, &c.)

If the writ of waste exists with us at all, it exists as a *personal*, not a *mixed*, action, the place wasted being no longer forfeited with us, (V. C. 1873, c. 183, § 1, 4); but the process is doubtless the same as formerly. There may be, however, possibly some doubt whether the action is not to be understood as abolished along with the forfeiture to which it gave effect, although it is believed that the action remains as at common law.

3^d. The Process in the Writ of Dower *unde nihil habet*.

The process is a writ of *præcipe quod reddat*, very similar to that used to institute a writ of right of dower. (Steph. Pl. (Tyler's ed.) 45; Rob. Forms, 6.)

2^o. The *Form of the Process*; W. C.

1^d. The Form of Process in England.

See 3 Bl. Com. 353, 356, 360, (Appendix xiii.)

2^d. Form of Process in Virginia.

The constitution provides, (Va. Const. 1869, Art. VI, § 26,) that writs shall "run in the name of the commonwealth of Virginia," and be attested by the clerks of the several courts; and it is directed by statute, (V. C. 1873, c. 166, § 1,) that until the court of appeals shall alter the forms of writs, the same may be as heretofore used, except so far as is otherwise provided. The court of appeals having made no order on the subject, the writs follow, for the most part, the English *formulae*, with such modifications as are found needful to adapt them to the existing state of the law; the modifications being commonly devised by the clerk who has occasion to issue them.

The forms of the writs used in instituting real actions have been already given. Let us look now to the forms employed for personal actions.

WRIT OF SUMMONS.

The Commonwealth of Virginia,

To the Sheriff of A. County, greeting:

We command you, that you summon D. D., if he be found in your bailiwick, to appear before the judge of our circuit court for our said county, at the court-house thereof, on the first day of the next term, [*or at the clerk's office of our circuit court for our said county, at the rules to be holden for our said court, on the first Monday in — next,*] to answer C. C. of a plea of, &c. [Here describe the action, *e. g. debt*: "of a plea of debt for one hundred and one $\frac{10}{100}$ dollars, damages \$101;" *covenant*: "of a plea of covenant broken, damages \$500, &c."] And have then there this writ. Witness, B. T., clerk of our said court, at the court house, this — day of —, in the year of our Lord —, and in the — year of our foundation.

Teste:

B. T., Clerk.

WRIT OF CAPIAS AD RESPONDENDUM.

The Commonwealth of Virginia,

To the Sheriff of A. County, greeting:

We command you, that you take D. D., if he be found within your bailiwick, and him safely keep, so that you have his body before the judge of our circuit court for our said county, at the court house thereof, on the first day of the next term, [or at the clerk's office of our circuit court for our said county, at the rules to be holden for the said court, on the first Monday in — next,] to answer C. C. of a plea of [describe the action, as "trespass on the case of *trover and conversion*, damages \$1,000;" of a plea of "trespass on the case in *assumpsit*, damages \$500," &c.] And have then there this writ. Witness, B. T., clerk of our said court, at the court house, this — day of —, in the year of our Lord —, and in the — year of our foundation.

Teste:

B. T., Clerk.

See Rob. Forms, 1 & seq; Appendix hereto, p. i and ii, note *.

3°. Whence and how Process is obtained in Virginia.

We are here to take notice of the diversity between actions *local* and *transitory*; local actions being those where the principal facts on which they are founded are local, and could have happened no where but in some particular place, whilst transitory actions are those where the principal facts are such as may have occurred any where, in one place as well as another. (3 Bl. Com. 294; St. Pl. 288-'9, (Tyler, 274-'5.)

Originally all actions were tried in the proper counties in which they arose, pursuant to the maxim, *vicini vicinorum facta præsumentur scire*, a principle which gave rise to no inconvenience; for all men being anciently in that subdivision of a *hundred*, which, as it consisted of ten families, was known by the name of a *decenna*, they were easily come at, the *decenna* being responsible for their appearance. But when the custom of the *decennary* began to wear off, men used to fly from their creditors, and this begot the distinction between *local and transitory actions*; the first relating to lands, such as real and mixed actions, trespass *quare clasum fregit*, actions for nuisance, &c., which must be tried where the lands lie; the other being for a debt or duty adhering to the person wherever he fled, comprising debts, contracts, and generally all matters relating to the person, or to personal property, and admitting of being tried in any county in England where the plaintiff chose to allege that the cause occurred. (Bac. Abr. Actions Local, &c.; Id. (A); St. Pl. 288; (Tyler,) 274, &c.)

From this state of the law it follows, that at common law, if an action were local, and the facts arose *out of the realm*, such actions cannot be maintained in the English courts, at least if there be any courts in the country where the wrong was done. (Donlson v. Matthews, 4 T. R. 503; Shelbey v. Farmer, 1 Stra. 646; Mostyn v. Fabrigas, Cowp. 181; King

v. Johnson, 6 East. 583; Livingston v. Jefferson, 1 Brock. 206 & seq; St. Pl. 289, (Tyler,) 274.)

With us, as at common law, all actions are either local or transitory; real and mixed actions being local, and all personal actions transitory. Real and mixed actions, therefore, are to be instituted and tried in the county or corporation where the land or part of it may be; and personal actions according to rules prescribed by statute, and presently to be stated. But it should be observed, that in all cases, in order to give the court of a State, jurisdiction against a single defendant, he must, (1), Have his domicile in that State, or be served therein with process; or (2), Some property or *chose in action* must be found therein, upon which the court can proceed *in rem*. (1 Rob. Pr. (2nd ed.) 316; Wright v. Oakley, 5 Metc. (Mass.) 402; Hopkirk v. Bridges, 4 H. & M. 413; Miller v. Sharp. 3 Rand. 41; Beirne v. Rosser, 26 Grat. 541.)

W. C.

1^d. Whence the Process is Obtained in Virginia; W. C.

1^o. Whence Process is Obtained in *Real and Mixed Actions*.

Process is obtained in Virginia, in real and mixed actions, from the clerk's office of the circuit or corporation court of the county or corporation wherein the *land sued for, or part of it, may be*. These are with us the *only local actions*. (V. C. 1873, c. 165, § 1, (cl. 3).)

2^o. Whence the Process is Obtained in *Personal Actions*.

Personal actions are with us *always transitory*. The process to institute them is obtained from the clerk's office of a circuit or corporation court in any county or corporation as follows;

W. C.

1^f. Wherein *any of the Defendants reside*.

See V. C. 1873, 165, § 1, (cl. 1.)

2^f. Wherein the Cause of Action, or any part thereof, arose, although none of the defendants may reside therein.

See V. C. 1873, c. 165, § 2.

3^f. If a Corporation be Defendant, wherein is its *principal office*, or the *residence of its mayor, rector, president*, or other chief officer, or wherein the *cause of action, or part of it, arose*.

See V. C. 1873, c. 165, § 1, (cl. 2.)

4^f. If the suit be brought to recover a loss under any *policy of insurance*, either upon *property or life*, wherein the *property named was situated*, or the *person whose life was insured resided*, at the *date of the policy of insurance*.

See V. C. 1873, c. 165, § 1, (cl. 2.)

5^f. If against a non-resident debtor, who has estate or debts due him in Virginia, *wherein such estate, or part of it, may be*.

See V. C. 1873, c. 156, § 1, (cl. 3.)

6^c. If defendant has no *known place of residence* in the Commonwealth, *wherein he is found*.

See V. C. 1873, c. 166, § 10; *Beirne v. Rosser & al*, 26 Grat. 541.

7^c. If on behalf of the Commonwealth, wherein is the *seat of Government*.

See V. C. 1873, c. 165, § 1, (cl. 4.)

8^c. If the Judge of a Circuit Court be interested, suit may be brought in any County or Corporation *in any adjoining* Circuit.

See V. C. 1873, c. 165, § 1, (cl. 5.)

2^d. How Process is Obtained.

Process is obtained from the clerk of the court upon an order or memorandum, made by the plaintiff or his attorney in the clerk's memorandum-book. In case the process desired is a *capias ad respondendum*, there must be a *special order of court*, or of a judge or justice of the peace, &c., as already explained. A tax is levied upon the process by the State government, which must be paid or secured before the process can be had. (V. C. 1873, c. 166, § 5; *Id.* c. 148, § 33; *Id.* 35, § 14.)

W. C.

1^o. The General Nature of the Contents of *Memoranda for Process*.

The memorandum must give names, sums, and other necessary particulars, to enable the clerk of the court to fill up and issue the process desired.

2^o. The Form of the Memorandum.

For substantial purposes the *mere form* of the memorandum is of no consequence; but as the inexperienced practitioner might omit some needful particular, unless he had some *exemplars* in his mind, a few forms are subjoined; W. C.

1^c. Form of Memorandum for *Action of Debt on Bond*.

"Charles Creditor v. David Debtor, action of debt on Bond, \$1,860. ¹⁰⁰/₁₀₀. Damages, \$1,860. To February rules. A., p. q."

The process in an action of debt on a bond or promissory note need not name the interest, which follows the principal as the shadow follows the substance. (*Hatcher v. Lewis*, 4 Rand. 152.) If judgment is rendered in such case by default, the clerk is by the statute directed to enter it for the principal sum due, with interest thereon from the time it became payable, (or commenced bearing interest), until payment. (V. C. 1873, c. 167, § 45.) But if a jury be impanelled, whether to try an issue in

the cause, or only to inquire of damages, it may at its discretion allow interest, and fix the period at which it shall commence. (V. C. 1873, c. 173, § 14.)

The damages in debt on a *money-bond*, or on a promissory note, are in general merely nominal, and, therefore, the amount of damages stated in the process is immaterial. Inasmuch, however, as the amount named in the declaration must conform to that in the process, (a variance between the two being fatal upon a *plea in abatement*); and because, moreover, where the bond is in a penalty, and is so old that the principal and interest together exceeds the penalty, the excess of interest can only be recovered *as damages*, (Tennant's Ex'or v. Gray, 5 Munf. 494; Baker v. Morris, 10 Leigh, 311), it is expedient as a practical device to adopt the rule of making the damages in such actions *always* the amount of the bond or note, in dollars, omitting the cents. Thus, if the sum named in the bond or note be \$564.75, let the damages be \$564. The practitioner will thus never be at a loss, if the process is not at hand, to conform the damages laid in the declaration thereto; and in the few cases where damages are of importance, he is in no danger, by inadvertence, of omitting to provide for their recovery.

2^d. Form of Memorandum for *Action of Debt on Negotiable Note*.

"C. C. v. D. D., action of debt on negotiable note, \$1,163, $\frac{1}{10}$ and \$2.25 costs of protest. Damages \$1,163. To February rules. B., p. q."

In an action of debt on a negotiable note, the process should demand the amount of the note, and the charges of protest, and state the damages claimed, although the latter will, in this case, be always merely nominal. Nor can the charges of protest be omitted in the process without waiving them altogether, for the declaration must conform to the writ; and if the declaration demands the costs of protest, when the writ does not, upon a plea in abatement for the variance, (V. C. 1873, c. 167, § 19), the declaration will be quashed; and where there is a judgment by default of appearance of the defendant, the variance will be ground for reversing the judgment *in the same court*, notwithstanding there be no plea in abatement. (Hatcher v. Lewis, 4 Rand. 152; Nadenbousch v. Lane, 4 Rand. 413; Payne v. Britton, 6 Rand. 102; Wainwright v. Harper, 3 Leigh, 270; V. C. 1873, c. 177, § 5.) But see Dabney v. Knapp, 2 Grat. 354.

These remarks will apply in like manner to an action of debt on an inland bill of exchange.

3^d. Form of Memorandum for an Action of Debt on a Foreign Bill of Exchange.

"Charles Creditor v. David Drawer and Edward Endorser, action of debt on foreign bill of exchange, £500 sterling, of the value of \$2,420, together with \$3 $\frac{7}{10}$ % the cost of protest, and \$242 damages. Damages \$2,420. To February rules. C., p. q."

In an action of debt on a foreign bill of exchange, the writ or process claims the amount of the bill, (if in a foreign currency reduced to that of the United States,) the costs of protest, together with the damages allowed by statute (V. C. 1873, c. 141, § 9,) on dishonored foreign bills, and the nominal damages demanded in other actions of debt. Interest is by statute allowed on the principal sum, and the costs of protest, not only in this case of foreign bills, but also in the case of an inland bill, and of a negotiable note, (V. C. 1873, c. 141, § 11); but it is not necessary to demand it either in the writ or declaration. (Hatcher v. Lewis, 4 Rand. 152; V. C. 1873, c. 167, § 45; Id. c. 141, § 11; Id. c. 173, § 14; *Supra*, p. 711; Wallace v. Baker, 2 Munf. 335; Baird v. Peter, 4 Munf. 76.)

4^d. Form of Memorandum for *Action of Covenant*.

"C. C. v. D. D., action of covenant broken, damages \$5,000. To February rules. D., p. q."

In the actions of covenant, of trespass on the case in assumpsit, (or upon promises,) of trespass on the case in trover and conversion, or for any other *tort*, and of trespass *vi et armis*, the action is said to *sound in damages*, and damages constitute the exclusive object of recovery. In detinue also, damages are an essential object of the action, but not the sole object. In all these cases, therefore, care must be taken to demand in the writ damages enough to cover the largest sum that the plaintiff can possibly expect a jury to allow him; and in order to be sure of this result, it is the practice in cases of contract, where the damages are susceptible of computation, to state them at not less than twice the amount really estimated, whilst, in cases of tort and of contracts of a more indefinite character, they are generally set down at many times the sum actually expected to be recovered. Thus, in actions of covenant and assumpsit, the plaintiff computes the largest sum that he can reckon the damages at, and puts in the writ twice or thrice as much; and in trespass *vi et armis* for assault and battery, or trespass on the case for slander, the amount is ten or twenty times the largest sum that he looks for; for whilst he may recover far less than he demands, he cannot in general

recover more. (Stephens v. White, 2 Wash. 212; Palmer v. Eubank, 3 H. & M. 502; Cloud v. Campbell, 4 Munf. 214; Tenant v. Gray, 5 Munf. 494.)

In debt on bond with collateral condition, the recovery, since the statute 8 & 9 Wm. III, c. 11, (of which the counterpart with us is found in V. C. 1873, c. 173, § 17,) has been also practically in damages, as we have seen, but damages limited by the amount of the penalty, so that in this action the sum laid for damages must be such as will certainly not fall short of the largest probable recovery. (2 Insts. Com. & Stat. Law, 753.)

5^t. Form of Memorandum for Action of *Trespass on the Case in Assumpsit*.

"C. C. v. D. D., action of trespass on the case in assumpsit, (or *upon promises*,) damages \$980. To March rules.
L., p. q."

6^t. Form of Memorandum for *Action of Detinue*.

"C. C. v. D. D., action of detinue for two mares, named respectively Flora and Lady Anne, with a horse-colt of Flora eight months old, and a mare-colt of Lady Anne one year old, of the value respectively, Flora of \$1,500; Lady Anne of \$1,800; Flora's colt, \$300; Lady Anne's colt, \$500. Damages, \$3,000. To February rules.
E., p. q."

The action of detinue sounds partly in damages, the recovery consisting of the specific chattel detained, or its value in case it cannot be had, and also of damages for the detention. Hence, here also, the amount of damages, as well as the sum named as the value of the chattel, or of each of the chattels sought to be regained, but especially the damages, are stated considerably beyond the truth, in order that the plaintiff shall be quite sure to recover all that a jury may give him. It seems, however, that the jury may find a larger value of the chattels than is laid in the writ or declaration. (4 Rob. Pr. 604-'5; 1 Ohit. Pl. 141, 142; Pawly v. Holly, 2 Wm. Bl. 853; Biggers v. Alderson, 1 H. & M. 61; Holliday v. Littlepage, 2 Munf. 539.)

7^t. Form of Memorandum for Action in *Trespass on the Case in Trover and Conversion*.

"C. C. v. D. D., action of trespass on the case in *trover and conversion*, for four horses of the value of \$4,100. To April rules.
F., p. q."

8^t. Form of Memorandum for *Action of Trespass vi et armis*.

"C. C. v. D. D., action of trespass *vi et armis*, damages \$6,500. To February rules.
G., p. q."

9^f. Form of Memorandum for Action of Trespass *vi et armis* for Assault and Battery.

“C. C. v. D. D., action of trespass *vi et armis*, for assault and battery, damages \$8,000. To February rules. H., p. q.”

10^f. Form of Memorandum for *Action of Trespass vi et armis quare clausum fregit*.

“C. C. v. D. D., action of trespass *vi et armis quare clausum fregit*, damages \$1,500. To February rules. J., p. q.”

11^f. Form of Memorandum for Action of *Trespass on the case in Slander*.

“C. C. v. D. D., action of trespass on the case for slander, damages \$2,500. To February rules. K. p. q.”

12^f. Form of Memorandum for *Writ of Forcible Entry, &c.*

“C. C. v. D. D., writ of summons to answer complaint that defendant is in possession, and unlawfully withholds from the plaintiff, a house and lot in the town of C. known as lot No — in the plan of said town [or a tract or parcel of land, &c., *describing it*.] To February term of circuit court. L. p. q.”

13^f. Form of Memorandum for *Action of Ejectment*.

There is no memorandum, nor is there need of any, no writ being issued. The suit is commenced by serving on the defendant a copy of the declaration, and of the notice accompanying it, notifying defendant when and where the declaration will be filed.

3^d. Mode of *Objecting to the Jurisdiction* of the Court.

If the process is sued from the *wrong clerk's office*, so that the court has no jurisdiction to try the cause, the objection must be made *by a dilatory plea*, called a *plea to the jurisdiction*. The common law requires it to be filed before any other plea; and in Virginia it must be filed *before a rule to plea, and before a demurrer, or a plea in bar*, which means that it must be filed at the *same rules with the declaration*. (V. C. 1873, c. 167, § 20.)

4^o. Mode of Executing the Process; W. C.

1^d. By what Officer in Virginia Process is Executed; W. C.

1^o. The General Rule as to the Officer to Execute Process.

For the most part, the process (wherever the suit shall be instituted) may be executed within the limits of his bailiwick by the *sheriff of any county or the sergeant of any corporation in the State*.

2^o. Exceptions to the General Rule; W. C.

1^f. Process against a Defendant (other than a *Rail Road, Canal, Telegraph, or Turnpike Company*), where the

cause of action arising in the county or corporation, is the *only ground for the court's jurisdiction*.

In that case process can be directed to *the officer of no other county or corporation* than that wherein the action is brought. (V. C. 1873, c. 166, § 2.) And if the process be illegally executed by the officer of any other county or corporation, the process and the execution of it are alike void; no plea in abatement is necessary, but the court may *ex officio*, and *a fortiori*, upon motion, abate the process, and the suit. (Warren v. Saunders, 27 Grat. 268; Garrard v. Henry, 6 Rand. 112, 116; Mantz v. Hundley, 2 H. & M. 312 & seq; 1 Rob. Pr. (1st ed.) 162.)

2^d. Process against a Corporation can be served upon its Officer only in the County or Corporation *in which he resides*.

And the return upon the process must show this, and state *on whom and when* the service was, otherwise the service shall *not be valid*. (V. C. 1873, c. 166, § 7.) And thus is introduced a marked diversity between the service of process against a corporation, and against an individual. In the latter case, although the officer is required under a penalty to make return of the *manner and time of service*, yet it is believed that the omission in his return of these circumstances of *time and manner* does not invalidate the process of itself, however it may *perhaps* make it abatable by a plea in abatement. (Barksdale v. Neal, 16 Grat. 318.)

2^d. The Manner in which *Process is to be Executed*; W. C.

Process is in general to be executed as notices are required to be served, (V. C. 1873, c. 166, § 6,) which is set forth in V. C. 1873, c. 163, § 1.

Let us observe the manner of executing process against, (1), Defendants generally; (2), Corporations; (3), Carriers, other than corporations; and (4), Non-residents of the State; W. C.

1^o. The Manner of Executing Process against Defendants Generally.

Process is executed either, (1), By delivering a copy to the defendant in person; or (2), By leaving a copy at his usual place of residence;

W. C.

1st. Service of Process by *delivering a copy* to Defendant in Person.

To enable the officer to do this, the clerk supplies him with as many copies as there are persons named in the process on whom it is to be served. (V. C. 1873, c. 166, § 6.)

It is provided expressly with us by statute, (V. C. 1873, c. 49, § 27,) that "every officer to whom any order, war-

rant or process may be lawfully directed, shall make true return thereon of the *day and manner* of executing the same, and *subscribe his name to such return*. Where the service is by a deputy, such deputy *shall subscribe to the return his own name as well as that of his principal*."

Where the *process* contains a *mandate addressed to the officer*, a return of "*executed*," showing also, in pursuance of the statute just cited, the day and manner of executing it, is sufficient, being a response that the thing commanded has been done; and it is believed that the return of "*executed*," alone, without showing the *day and manner*, will also suffice, at least unless the objection be made by plea in abatement, (*Barksdale v. Neal*, 16 Grat. 318); but in the case of a *notice* which is not directed to any officer, such a return is unmeaning. The officer must in that case state in his return the particulars of the service, showing the manner and time, and that it was in accordance with the requirements of the statute. The *officer's statement* of service suffices by the statute itself, (V. C. 1873, c. 164, § 1); but if the notice or process be served by any other person, the return must be *verified by affidavit*. (Anon. 1 H. & M. 206; *Barksdale v. Neal*, 16 Grat. 317-'18.) The only case where the officer is required explicitly to state *when on and whom* the service was, is the case of a summons against a corporation, (V. C. 1873, c. 166, § 7,) and *the expression* of the requirement in that instance is justly regarded as a strong argument against requiring it in other cases, upon the maxim *expressio unius, alterius est exclusio*. (*Barksdale v. Neal*, 16 Grat. 318.)

2^d. Service of Process by *leaving a copy* at Defendant's usual place of Residence; W. C.

1st. Leaving the Copy there with Defendant's *Wife*, or any *White** Person who is a *member of his family*, and above the age of sixteen years, and giving information of the purport.

See V. C. 1873, c. 163, § 1.

2^d. Posting a Copy, (if neither Defendant, nor his Wife, nor any such person be found there), *at the front door* of defendant's *place of abode*.

See V. C. 1873, c. 163, § 1.

2^o. The Manner of Executing Process *against Corporations*.

The service of process against a corporation may be on the president, or chief officer, or in his absence from the county or corporation in which *he resides*, or in which is the *principal office* of the corporation, on the next subor-

*Note.—The word *white* is omitted in the edition of the Code of 1873, but it is not perceived that any Act of Assembly has authorized such omission.

dinate, as named in the statute. If the case be against a bank of circulation, and be in a county or corporation wherein the bank *has a branch*, service on the president or cashier of such branch bank shall be sufficient; and if the case be against some other corporation, whether incorporated by the laws of this State or any other State or country, transacting business in this State, *on any agent thereof*, or any person declared by the laws of this State to be an agent of such corporation; and if there be no such agent in the county or corporation, publication of a copy of the process, or notice, as an order of publication in the case of a non-resident is published, under V. C. 1873, c. 166, § 14. (V. C. 1873, c. 166, § 7, 14, 15; 3 Bl. Com. 589; 1 Tidd's Pr. 112, 121; 1 Insts. Com. & Stat. Law, 564 & seq.) Service on any person under these provisions must be in the county or corporation *in which he resides*, and the return on the process must show this, and state *on whom and when* the service was, otherwise the service shall *not be valid*. And similar proceedings are also provided for when an action is brought against a corporation before a *justice of the peace*, upon small demands. (V. C. 1873, c. 166, § 7; Id. c. 56, § 32 to 35; Barksdale v. Neal, 16 Grat. 318.)

And in construing this statute, it should be noted in respect to suits against banks which *have branches concerned therein*, that the suit is to be brought, and the declaration filed, *not against the branch*, (which has no separate existence), but against the *mother-bank*, by its proper corporate name, the statute only allowing the process against the mother-bank *to be served* on the officers of the branch. (Tompkins v. Branch Bank of Va., 11 Leigh, 374; Mason v. Farmer's Bank, 12 Leigh, 84, 88-'9.)

3°. The Manner of Executing Process *against Carriers*, other than Corporations.)

The process against any common carrier, (other than a corporation), for any liability as such, it shall be sufficient to serve on *any agent*, or on the *driver, captain, or conductor* of any vehicle of such carrier, in the county or corporation wherein the case is commenced, and to publish a copy of the process, as an order of publication against a *non-resident* is published. (V. C. 1873, c. 166, § 8, 14, 15.)

4°. The Manner of Executing Process against a *non-resident of the State*.

In this case the common law had no adequate mode of proceeding, and in general when the defendant was a non-resident a failure of justice ensued. With us resort is had to a *publication of the summons*, or the substance of

it, in the newspapers, as the best practical alternative available; and which the statute makes a sufficient ground on which to proceed with the suit, allowing only to the non-resident some short period of grace in which to correct any injustice which may be done him. (V. C. 1873, c. 166, § 10, 14, 16.)

Let us see, (1), The mode of ascertaining the non-residence of the defendant; and (2), The proceedings when the fact of non-residence is legally ascertained, and an order of publication is awarded;

W. C.

1st. The Mode of ascertaining the Non-residence of Defendant.

The non-residence of the defendant must, of course, be satisfactorily ascertained before a mere *constructive service* can be substituted for an *actual one*. The modes of ascertaining it, mentioned in the statute itself, are three, namely, by (1), Affidavit of non-residence, explicit and direct; (2), Affidavit of due diligence to find defendant; and (3), Affidavit that process has been repeatedly sent, without effect, to the county or corporation of defendant's residence;

W. C.

1st. Affidavit of Non-residence, Explicit and Direct.

The non-residence of defendant may be proved *by the direct and positive affidavit* of anybody who personally knows the fact, whether the plaintiff himself, or a third person. (V. C. 1873, c. 166, § 10; Acts 1876-'7, p. 274, c. 264.)

2nd. Affidavit of due Diligence to find Defendant.

The non-residence of defendant may be proved secondly, by affidavit that *diligence has been used* by or on behalf of the plaintiff, to ascertain in what county or corporation he is, without effect. (V. C. 1873, c. 166, § 10; Acts 1876-'7, p. 274, c. 264.)

3rd. Affidavit that *Process has been twice sent* to the County or Corporation of Defendant's Residence, &c.

The non-residence of defendant may be proved thirdly, by affidavit that process directed to the officer of the county or corporation in which *he resides or is*, has been *twice* delivered to such officer *more than ten days* before the return-day, and been returned *without being executed*. (V. C. 1873, c. 166, § 10; Acts 1876-'7, p. 274, c. 264.)

As we are now engaged with *actions at law*, it is not directly germane to make mention of *proceedings in equity*, yet it may not be amiss to ask the student to observe that *in equity* there are three cases more, besides those here mentioned, where an order of publication is proper, namely:

(1), Where the defendant, in a suit *for a divorce* from the bond of matrimony, is under *sentence of confinement in the penitentiary* :

(2), Where in any suit in equity the bill states that the names of any persons interested in the subject to be divided or disposed of *are unknown*, of which affidavit is made. (V. C. 1873, c. 166, § 10); and

(3), Where in any suit in equity the number of defendants upon whom process has been executed *exceeds thirty*, and it appears *to the court* by the bill, or other pleading, or exhibits filed, that the parties before the court represent like interests as those not served with process, an order of publication may be entered against the latter. (Acts 1876-'7, p. 274, c. 264.)

2^d. Proceedings when the fact of Non-residence is legally Ascertained, and an *Order of Publication* is Awarded.

The proceeding, where the fact of non-residence is legally ascertained, is by *order of publication*, in pursuance of which a notice of the pendency of the suit, and its character and object, accompanied by a virtual summons to appear and defend it, is published for *four weeks successively* in some newspaper designated in the order, and is posted at the front door of the court-house, *on the first day of the next county or corporation court*;

1st. Where the *Order of Publication* is made.

The order may be made *in the court* where the suit is instituted, (except in the last case above stated; that is, where the number of parties exceeds thirty), or by the clerk of the court, *at any time in vacation*, in the clerk's office. (V. C. 1873, c. 166, § 10; Acts 1876-'7, p. 274, c. 264.)

2^d. Mode of *Framing the Order of Publication*.

The order states briefly the nature and object of the suit, and requires the defendant to appear *within one month* after due publication thereof, and do what is *necessary to protect his interests*. (V. C. 1873, c. 166, § 10.)

3^d. Mode of *Executing the Order of Publication*.

The order is published for *four successive weeks* in such newspaper as the court or clerk may direct, and is posted *by the clerk* at the front door of the court house, *on the first day of the next county or corporation court after such order is entered*. (V. C. 1873, c. 166, § 10, 14, 15, 16.)

No proceeding against a non-resident can lawfully be had unless this order of publication be duly executed; but it may be proved to an appellate court to have been duly executed, not only by the formal and direct evidence thereof contained in the record, but also by a

recital in the record, that it was regularly executed. (Hunter v. Spotswood, 1 Wash. 148; Gibson v. White, 3 Munf. 94; Craig v. Sebrell, 9 Grat. 133; Moore & als v. Holt, 10 Grat. 291.)

In order to illustrate the proceeding more perfectly, it may be expedient to append the forms:

Affidavit of Non-Residence.

Virginia :

A. County, to wit:

This day C. C. appeared in person before me, a justice of the peace [or *notary public, or commissioner in chancery, &c.*, V. C. 1873, c. 12, § 8], in and for the county and State aforesaid, and made oath that D. D., against whom he has lately instituted (or is about to institute) an action at law in the circuit court of the said county of A., is a non-resident of this commonwealth.

Given under my hand, this ——— day of ———, in the year of our Lord 187—.

J. J., J. P.

Next follows *the order of publication*, which we will suppose to be made, as commonly it is, *at the rules*.

Virginia :

At rules held in the clerk's office of the circuit court for the county of A., on Monday, the _____ day of _____, in the year of our Lord eighteen hundred and ____.

[illegible]

The object of this suit is to recover of the said defendant, D. D., the sum of _____ dollars, with lawful interest thereon, after the rate of _____ per centum per annum, from the _____ day of _____, in the year of our Lord eighteen hundred and _____, until paid, for debt due from him to the said plaintiff C. C., by bond (or *however else it may be due*). And affidavit having been made [or *it appearing according to law*] that the said defendant D. D. is not a resident of this State, the said defendant is required to appear within one month after due publication of this order, in the clerk's office of our said court, at rules, to be holden therefor, and do what is necessary to protect his interests. And it is ordered that a copy of this order be forthwith published once a week, for four successive weeks, in the C., a newspaper printed in the town of C., in the county of A, and be posted at the front door of the courthouse of said county, on the first day of the next county court for the said county after the date of this order.

A copy.

Teste :

B. T., Clerk.

Proof of Execution of the Order of Publication.

Publication in Newspaper.

V. C. 1873, c. 172, § 33.

I, L. W., the editor and one of the proprietors of the C., a newspaper printed in the town of C., in the county of A., do hereby certify that the foregoing order of publication was duly published in the said newspaper, for four successive weeks from and after the ——— day of ———, in the year of our Lord 18—.

L. W., Editor C. C.

It is believed that the publication, in order to be such as the law requires, must be *once in every seven days*, for *four successive periods of seven days each*, and that the interval between any two publications must not be *less than seven days*; and the publications must be *four in number*. (Bump's Pr. of Bankruptcy, 345.)

Posting at the Front Door of the Courthouse.

V. C. 1873, c. 166, § 14.

Virginia:

A. county, to wit:

B. T., clerk of the circuit court of A. county, this day appeared in person before me, a justice of the peace in and for the county and State aforesaid, and made oath that, on the first day of the county court of A. county, at the ——— term thereof, in the year ———, he posted a copy of the foregoing order of publication at the front door of the courthouse of the said county.

Given under my hand, this ——— day of ———, in the year of our Lord 18—.

J. J., J. P.

As it is the clerk's official duty, as a sworn officer, to post the order, it is probable, or at least possible, that his *certificate* of the fact would suffice; but as the statute does not say so, it is safer to have his affidavit.

4^s. Consequences of the Defendant's not Appearing, in Pursuance of the *Order of Publication*.

If the defendant does not appear within *one month* after such publication is *completed*, the case may be tried as to him, and such judgment entered as may *appear to be just*. And no other publication shall be thereafter required of any proceeding in court in the same cause, or before a commissioner (in equity,) or for taking depositions, unless specially ordered by the court. (V. C. 1873, c. 166, § 15.)

5^s. Saving in Favor of Persons not actually served with Process, and not Appearing.

Within *five years* from the date of the judgment, or within *one year* from being served with a copy of the judgment, any defendant who was not served with a copy of the process, and did not appear, may petition to have the cause re-heard, and may plead, and have any injustice in the proceedings corrected. (V. C. 1873, c. 166, § 16; *Jas. R. & Ka. Co. v. Littlejohn*, 18 Grat. 53, 69, 74; *Overstreet v. Marshall*, 3 Call. 192; *Pugh's Ex'or v. Jones*, 6 Leigh, 299; *Williamson v. Gayle*, 4 Grat. 180.)

Outlawry in *civil suits* is out of use in Virginia, having been universally substituted, in such cases, by *order of publication*. (3 Bl. Com. 282-'4.) It is still retained,

however, in *criminal* proceedings, and thereupon the same judgment, execution, and disabilities ensue, and are awarded as if the party were convicted of the offence charged. (V. C. 1873, c. 201, § 28.)

3^d. Mode of *Securing to the Plaintiff the Effect of the Suit*.

It is conceivable that the defendant may make use of the notice afforded by the institution of the suit, and the service of the process, to abscond and carry his effects with him, or at least to remove his effects out of the reach of the jurisdiction of the court. And against these contingencies the law makes the most effectual provision possible.

Let us observe, (1), The former mode, prior to 1st July, 1850, of securing the effect of the suit; and (2), The present mode, since 1st July, 1850, of accomplishing the same result. W. C.

1^o. The Former Mode, prior to 1st July, 1850, of *Securing the Effect of the Suit*.

The common law proceeded, for the most part, as we have seen, upon the notion that if the *person of the defendant* were secured, the forthcoming of the *property* to answer the complaint might generally be depended on; and the law of Virginia, down to 1st July, 1850, acted, well nigh exclusively, upon the same principle. The defendant was required, in some instances, *as of course*, at the pleasure of the plaintiff, and in other cases by *special order*, for cause shown, to *give bail*, that is, security that his person should be forthcoming, if the plaintiff got judgment; W. C.

1^t. In what Cases, prior to 1st July, 1850, *Bail might have been Required*.

Prior to 1st July, 1850, bail might have been required, *as of course*, at the pleasure of the plaintiff, in an *action of debt*, for the payment of money on a *note in writing*; in an *action of covenant* and of *detinue*; and in certain cases provided for by statute; and by *special order*, for cause shown by *affidavit*, in any action. (1 Rob. Pr. (1st ed.) 126 & seq.)

2^t. The Undertaking of the Bail, and the Mode of enforcing it.

The undertaking of the bail, (which was by *recognizance* entered into *before the sheriff*, &c.), was that defendant should satisfy the judgment of the court, or render his body to prison in execution for the same, or that he (*the bail*) would do it for him. (2 Tuck. Com. 235; 1 Rob. Pr. (1st ed.) 134.)

The recognizance of bail was familiarly styled a *bail-bond*, but to all intents and purposes it was a *matter of record*; and hence, when a default occurred on the *part*

of the bail, by the non-satisfaction of the demand, and also by the non-surrender of the defendant, the proceeding against the bail was by writ of *scire facias*, which is a proceeding applicable only to obligations of record.

2°. The Present Mode of Securing the Effect of the Suit, since 1st July, 1850.

The idea having prevailed strongly with the learned compilers of the Code of 1849, that imprisonment on civil process was a relic of Gothic barbarism, quite useless for its alleged purpose, and that the rendition of a defendant's *property* could be as well coerced by process directed immediately against the *property*, as by that *against the person*, the compilers proposed to abolish all imprisonment in *civil cases*. and, therefore, *to do away with bail*. And they provided as a substitute for bail an *attachment* against the *defendant's effects*; which latter, however, proved so ineffectual a substitute, that after an experiment of but a few months the legislature was persuaded to return to the discarded device of *arrest and bail*. They now guarded, however, against the abuses which, under the former system, had sometimes prevailed, by allowing *arrest and bail only for cause shown*. Thus, at present, with us, the effect of the suit is secured *by means of bail*, if it shall appear that the defendant is *likely to abscond* unless arrested; and by means of an *attachment*, if he manifests a design to *send his property away*;

W. C.

1°. Effect of the suit secured *by means of Bail*; W. C.

1°. In what Cases Bail is Demandable.

Bail may be obtained by special order of the court where a suit is pending, or of a judge or justice of the peace wherever such court, judge or justice is satisfied by affidavit of the plaintiff, or of some one else, that the *cause of action is just*, and that the defendant is *about to quit the State*, unless forthwith apprehended. (V. C. 1873, c. 148, § 33.)

2°. Proceeding upon the Order of Court, &c., to arrest the Defendant.

The plaintiff, upon obtaining such order, may sue out a writ of *capias ad respondendum*, by virtue of which the defendant is arrested, and committed to jail, unless he gives bond with security in the sum specified by the order of the court, &c., conditioned, if the judgment be against him, to *answer such interrogatories* as the plaintiff shall think fit to propound touching his property, as provided in case of execution, (V. C. 1873, c. 184, § 5), and to deliver up his property to satisfy the execution. And the bond is returned by the officer to the clerk's

office, along with the writ. (V. C. 1873, c. 148, § 35.)

- 3^a. When Defendant is discharged from Arrest, or from the obligation of the bond.

The defendant is discharged from arrest, or from the obligation of the bond, as the case may be, in the cases following, (V. C. 1873, c. 148, § 36, 37);

W. C.

- 1^b. Where there is *no probable cause* to believe that Defendant was going to quit the State.

See V. C. 1873, c. 148, § 36.

- 2^b. Where the Plaintiff is *Cast in the Suit*.

See V. C. 1873, c. 148, § 36.

- 3^b. Where the Plaintiff *omits to file Interrogatories*, within a *reasonable time*, after being required so to do.

The defendant must be discharged unless interrogatories be filed within such time as the court, judge, commissioner, or justice *may deem reasonable*. (V. C. 1873, c. 148, § 37.)

- 4^b. Precaution against abuse of the *Writ of Capias ad Respondendum*, by Plaintiff.

Before the *capias* issues the plaintiff must file in the clerk's office a bond with security, conditioned to pay defendant the costs and damages occasioned by the arrest. (V. C. 1873, c. 148, § 39.)

- 2^c. Effect of suit secured by *Attaching Defendant's Property*.

We have already seen something of the mode of proceeding in attachments for rent not yet due; let us now inquire into attachments designed to secure the effect of a suit. To that end we may note, (1), At what stage of an action an attachment is obtainable; (2), The mode of obtaining it; (3), The mode of levying it; and (4), The proceedings on it;

W. C.

- 1^c. At what Stage of the Action an Attachment is Obtainable.

An attachment may be obtained at the time *the suit is brought, or afterwards*. (V. C. 1873, c. 148, § 2; Wright v. Rambo, 21 Grat. 158.)

- 2^c. The Mode of Obtaining an Attachment.

It is obtained from the *clerk of the court* where the suit is to be brought, or where it is pending, upon affidavit of the plaintiff or other person, that the plaintiff's cause *is believed to be just*, and that defendant *intends to remove, is removing, or has removed his effects out of the State*, or the proceeds of the sale of his property, or a material part of such property or proceeds, so that process of execution on a judgment in said suit, when it is obtained, will be unavailing. If the suit be *for spe-*

cific property, the attachment may be against the specific property sued for, and against defendant's estate for so much as is sufficient to satisfy the probable damages for its detention; or, at the option of the plaintiff, against the defendant's estate *for the value* of such specific property, and the damages for its detention. If the suit be to recover money for a claim, or damages for a wrong, the attachment shall be against the defendant's estate for the amount specified in the affidavit as what he ought to recover. (V. C. 1873, c. 148, § 2; Pulliam v. Aler, 15 Grat. 54; Spengler v. Davy, Id. 381.)

3^a. Mode of *Levying an Attachment*; W. C.

1^a. On what Property.

The attachment may be levied on any estate, *real or personal*, of defendant, (V. C. 1873, c. 148, § 7); and whether in *possession* or *in action*; but not effects in the hands of an officer, (*e. g.* the *State Treasurer*.) which he holds by law, in *pursuance of a trust*. (Rollo v. Andes Ins. Co. 23 Grat. 509.)

2^a. In what Manner Levied.

The attachment is levied by serving a copy of it on the person in possession of the chattels *in possession*; and on the person owing the *choses in action*; and as to *real estate*, by such estate being mentioned and described by *endorsement on the attachment*. (V. C. 1873, c. 148, § 7; *Ante*, p. 478, &c.)

3^a. How the Property is Secured to be forthcoming; W. C.

1^a. The Lien of the Creditor on the Property Attached.

The lien of the attaching creditor dates from the *service of the attachment* in respect to chattels *in possession and choses in action*; and as to *real estate*, from the *date of the attachment*. (V. C. 1873, c. 148, § 12, 26; Erskine v. Stanley, 12 Leigh, 406; Caperton v. McCorkle & al, 5 Grat. 177; Moore v. Holt, 10 Grat. 284; Puryear v. Taylor, 12 Grat. 401; Clark v. Ward, 12 Grat. 440; Smith v. Smith, 19 Grat. 545; *Ante*, p. 479, &c.)

2^a. Officer taking the Property Attached into his Possession.

The officer may not take the property attached into his possession unless the plaintiff gives bond and security to answer the costs and damages which may be awarded against him, or sustained by any person by reason of suing out the attachment. (V. C. 1873, c. 148, § 8.)

4^a. How the Person in Possession of the Property may retain it in his Possession.

The person in possession of the property may retain it in his possession by giving a *forthcoming or delivery bond*, with good security, payable to the plaintiff, with condition to have the property forthcoming at such time and place as the court may require; or the defendant may release from attachment the *whole estate attached*, by giving bond with condition to *perform the judgment of the court*. The penalty in the case of the forthcoming bond is at the option of him who gives it, double the amount of the damages, or double the value of the property. In the latter case—which may be called a *replevy-bond*—it is double the amount or value for which the attachment was issued. (V. C. 1873, c. 148, § 13, 14.)

4^s. Proceedings on Attachment; W. C.

1^h. Order of Publication.

When any such attachment as is now under consideration is *returned executed*, an order of publication must be made against the *defendant*, against whom the claim is, unless he has been served with a *copy of the attachment, or with process* in the suit wherein the attachment issued. (V. C. 1873, c. 148, § 20.)

2^h. The Defence to Attachment; W. C.

1ⁱ. Who may make Defence.

Either the defendant in the attachment, or any *garnishee*, or any party to a *forthcoming or replevy-bond* given as above described, or the *officer*, who is liable to the plaintiff by reason of such bond being adjudged bad, may make defence to the attachment, which however, is not thereby discharged, nor the property released. (V. C. 1873, c. 148, § 21; *Tiernans v. Sibley & als*, 2 Leigh, 25; *Ante*, p. 481.)

2ⁱ. The Defence which may be Made.

The *right to sue out the attachment* may be contested, and when the court is of opinion that it was issued on *false suggestions*, or without sufficient cause, judgment shall be entered that the attachment *be abated*. (V. C. 1873, c. 148, § 22; *Mantz v. Hundley*, 2 H. & M. 308; *Jones & als v. Anderson*, 7 Leigh, 308; *McClung v. Jackson*, 6 Grat. 96; *Claffin & Co. v. Steenbock*, 18 Grat. 842; *Wright v. Rambo*, 21 Grat. 158; *Ante*, p. 481, &c.)

When the attachment is properly sued out, and the case heard *upon its merits*, if the court be of opinion that the claim of the plaintiff *is not established*, final judgment shall be given *for the defendant*, with costs of course, and an order for the restoration of the attached effects. (V. C. 1873, 148, § 22; *Ante*, p. 481, &c.)

3^b. Judgment for Plaintiff, and Order of Sale on Attachment.

If the claim of the plaintiff be established, judgment shall be rendered for him. (V. C. 1873, c. 148, § 23;) W. C.

1¹. Judgment for Plaintiff in respect to the *visible property Attached*.

See the explanation under this head, given in connexion with attachments for rent, (*Ante*, p. 482,) which is just as applicable here. (V. C. 1871, c. 148, § 23, 24; O'Brien v. Stephens, 11 Grat. 613-14.)

2¹. Judgment for Plaintiff *in respect to the Garnishee*.

See the explanation in case of attachments for rents, (*Ante*, p. 483 &c.) which is just as applicable here. (V. C. 1873, c. 148, § 17, 18, 19; Balto. & O. R. R. Co. v. Gallahue, 14 Grat. 563, 568; Pulliam v. Aler, 15 Grat. 54.)

4^b. Protection to a Defendant who does not Appear.

The plaintiff, before he can *sell the property attached*, must give bond, with good security, in such penalty as the court shall approve, with condition to perform the future order of the court; that is, supposing the defendant not to have appeared, nor to have been served with a copy of the attachment sixty days before the judgment. And if the plaintiff fail to give such bond in a reasonable time, the court shall dispose of the estate attached, or its proceeds, as to it shall seem just. (V. C. 1873, c. 148, § 24; Watt's Ex. v. Robertson, 4 H. & M. 442.)

5^b. Right of Subsequent Hearing reserved to Defendant.

If defendant has not been *personally served* with process he may, within five years from the judgment, or one year from the service of a copy of the judgment, petition to have the cause re-heard; and on giving security for costs he shall be admitted to make defence against the judgment, as if he had appeared before the same was rendered, except that the title of any *bona fide* purchaser of property sold under such attachment is not to be impeached. Nor is this provision available in any case where defendant was served with a copy of the attachment, or with process in the suit wherein it issued, more than sixty days before the date of the judgment, nor in any case in which he appeared and made defence. (V. C. 1873, c. 148, § 27, 28; Platt v. Holland, 10 Leigh, 507; Rootes v. Tompkins, 3 Grat. 98; Barbee v. Pannill, 6 Grat. 442; Lenows v. Lenow, 8 Grat. 349.)

6^h. Intervention of a Third Person Claiming Property Attached.

At any time before the property attached is sold, or the proceeds of sale paid over, any person disputing the validity of the plaintiff's attachment thereon, or stating a claim, interest, or lien in connection therewith under another attachment or otherwise, may file a petition setting forth the nature of his claim, and upon giving security for costs a jury is to be impanelled to inquire into the claim; and if it be established the court shall make such order as is necessary to protect his rights. (V. C. 1873, c. 148, § 25; *Barnett v. Meredith*, 10 Grat. 651; *McClung v. Jackson*, 6 Grat. 96.)

5^o. Mode of *Returning Process*, and the *Consequence of the Several Returns*; W. C.

1^d. The *Return-Day* of Process.

Process from any court, whether original, mesne, or final, must be made returnable *within ninety days* after its date, *to the court on the first day of a term*, or *in the clerk's office to some rule-day*. (V. C. 1873, c. 166, § 2.)

2^d. The *Returns and Proceedings* thereon; W. C.

1^o. The Return of "*Executed*."

The declaration, or formal complaint, is to be filed, and the suit proceeds.

2^o. The Return of "*Not Executed*."

An *alias summons*, or *alias capias*, as the case may be, is issued, and if that be returned in like manner, a *pluries summons*, &c., and so *toties quoties*, each successive process after the *alias* being denominated a *pluries*. These phrases are derived from prominent Latin words contained in the writs when they were in Latin. Thus the precept in an *alias summons* is, "We command you *as at another time* (*alias*) we have commanded you;" and in a *pluries summons* it is, "We command you, *as often heretofore* (*pluries*) we have commanded you." Hence, if the subsequent writ is sent to the sheriff, not of the same, but of *another county*, these phrases are inapplicable. See V. C. 1873, c. 166, § 3.

3^o. Return of "*Non-Resident in Bailiwick*."

If, notwithstanding this return, the court still has jurisdiction, a summons may issue to another county or corporation. But if the only ground of the court's jurisdiction were the defendant's residence in the county or corporation, the suit (except in the case of certain corporations,) abates as to that defendant. (V. C. 1873, c. 167, § 7.)

4^o. Return of "*Non-Resident in Commonwealth*."

This is not a proper return for the officer to make, for he cannot know *officially* that defendant does not reside in

the *commonwealth*. It amounts, however, to the return of "non-resident in bailiwick," and is followed by the same consequence. But upon the filing of the requisite affidavit, showing that the defendant does not reside in the commonwealth, an *order of publication* should be made and proceeded with, as already described. (V. C. 1873, c. 166, § 10; *Ante*. p. 537, & seq.)

6°. Rules and Rule-Days.

Rules are *orders of court*, whether made in court, or in the clerk's office, and *rule-days* are days set apart periodically for making rules or orders in the clerk's office, in causes pending; W. C.

1^d. The Object in *having Rule-Days*.

The object of rule-days is to expedite the maturing of causes in the recess, or vacation of the court, by entering all such *formal orders* as may be necessary for the purpose of preparing causes for trial, and especially for the purpose of enabling the parties to conduct that forensic altercation known as *pleading*, whereby the merits of the controversy are analyzed, and the point or points are developed on which it is proposed to rest the fate of the cause. Rules (or *orders*) to declare, plead, reply, rejoin, sur-rejoin, rebut, sur-rebut, &c., are given from month to month, and expire with the ensuing rules. (V. C. 1873, c. 167, § 4.)

2^d. Where the *Rules* or *Orders* are made.

They are made in the clerk's office of each court, under the direction of the clerk, subject to the *control of the court at the next term*. (V. C. 1873, c. 167, § 1, 52.) And if there happen to be no clerk, the cause shall stand continued until the next rule day after there is a clerk. (V. C. 1873, c. 167, § 2.)

An irregularity committed at one rules cannot be corrected at another, but must await the next term of the court. And at the term the correction may be made, and any step taken which might have been taken at rules. (*Southall v. Exchange Bank*, 12 Grat. 315-'16.) Thus, at August rules, 1852, a declaration *in debt* was filed for \$8,860, and a common order taken. At September rules, defendant filed a plea of *payment* of \$8,880, to which, at the same rules, plaintiff filed a replication, and issue was joined upon it in the clerk's office; but *judgment was not taken for the \$60*, as to which plaintiff had said nothing. At the term ensuing, on the 29th September, the defendant complained, that by not taking judgment for the \$60, the suit was *wholly discontinued*, and should have been *dismissed at the rules*, (1 Chit. Pl. 453; St. Bl. 215-'15); and he moved for a correction accordingly. The motion was granted, but the discontinuance was immediately set aside, and the cause re-

manded to rules for further proceedings. At October rules the plaintiff *made the same mistake* as before substantially, by confirming the common order as to the *whole debt*, without *taking any notice of the plea*. At November and December rules, 1852, and January and February rules, 1853, the cause was continued on the plaintiff's motion, for a replication to the pleas, which at March rules 1853, was filed, and then plaintiff took a confirmation of the common order for the \$60, not answered by the plea. At the following term of the court, the defendant again moved the court *to remand the cause to rules*, because the clerk had improperly entered a confirmation of the common order for the whole debt at October rules, 1852, without regard to defendant's plea, and had improperly allowed that irregularity to be corrected at March rules, 1853. The court, however, considered that, under the provision above referred to, it was competent to allow the irregularity to be corrected *in court*, and accordingly set the proceedings at rules aside, and permitted the plaintiff to file his replication, and to take judgment for the \$60 unanswered by the plea; and this was held by the court of appeals to be the proper course, without remanding the cause to the rules. But it also held that the defendant was thereupon *entitled to a continuance of cause*, had he demanded it, until the next term. (*Southall v. Exchange Bank*, 12 Grat. 312, 316.)

3^d. Days appointed for the purpose of holding the Rules.

The *first Monday* in every month, and the *two following days*, are appointed as rule-days for all the courts which have original jurisdiction, unless the term of a circuit or corporation court designated for the trial of *civil causes*, in which *juries are required*, commence on either of those days, or on either of the last five days of the preceding week, and then on the last Monday of the preceding month. (V. C. 1873, c. 167, § 1.)

And where the term commences on the *Monday before the first Tuesday* of any month, the rules shall be held on the Monday before the commencement of the term. And if the continuance of the rules for *three days* will interfere with the term of the court, they shall not continue beyond the day preceding the commencement of the term. (V. C. 1873, c. 167, § 1.)

SECTION II.

2^b. The Pleading and its Incidents.

We are here to set forth, (1), The general nature of pleading and its objects; (2), The history of pleading; and (3), The alternate allegations in pleading;

W. C.

1°. The General Nature of Pleading, and its Objects.

Pleadings are not, as is sometimes supposed, the arguments of counsel addressed to the jury, or to the court, but the *mutual altercations* between the plaintiff and defendant, the design of which is to analyze the merits of the cause, and to ascertain the *precise subject of controversy*, preparatory to trial.

Formerly these alternate allegations were put in by the counsel, or by the parties themselves, *ore tenus* in court, and then minuted down by the chief clerk or *prothonotary*; whence, in the old law French, the pleadings are frequently denominated *the parol*. (3 Bl. Com. 293.)

This method of pleading *viva voce*, seems to have been universally in use among the early Gothic judicatures of Europe, and is indeed the natural practice of all countries where the acts of civilization have made little progress. It certainly prevailed in the English courts in the reign of Henry III, and is generally supposed to have been retained there to a much later era, probably to about A. D. 1352, or the middle of the reign of Edward III, (St. Pl. 28; Id. (Tyler's Ed.) 59, 63.)

However that may be, the pleadings have long since ceased to be delivered orally, or in open court, but are drawn up on paper for the use of the attornies on both sides, being in Virginia filed in the proper office, (namely, the clerk's office of the court in which the suit is brought,) for the purpose of being mutually accessible to the parties and their counsel; and those pleadings, together with the entries from time to time made touching the cause on the rule-book, and on the minutes of the court in term, constitute the *record in the cause*.

Originally, this record was the contemporaneous minute, made, as has been said, by the *prothonotary*; and hence it is that the pleadings pursue the style in which the record itself was drawn up, being like it expressed in the *third person*: "C. C. complains of D. D.," &c.; "D. D. comes and defends the wrong and injury," &c. And like it they state the form of the action, and sometimes the appearance of the parties, and other acts and proceedings in court, as if they were transcripts from the record. (Steph. Pl. 28 & n (8); Id. (Tyler's Ed.) 63-'4.)

It was the duty of the judges to superintend the oral contention thus conducted before them, obliging the pleaders to confine themselves, at each stage of the altercation, to a single independent averment, and to pretermitt all irrelevant and immaterial allegations, until at length they arrived at *some specific and single relevant and material point or matter, affirmed on one side and denied on the other*. If this matter

proved to be a *point of law*, it was submitted to the court for decision; and if a *point of fact* it was referred to that one of the several methods of trial which was appropriate, and was agreed on between the parties, of which that by a *jury of the country*, or *by the country*, as it is often called, was the most usual.

This result being attained, the parties were said to be *at issue* (*ad exitum*, that is, *at the end* of their pleading), the question so set apart for decision was called *the issue*, and was designated according to its nature, as an *issue in fact*, or an *issue in law*. And the whole proceeding closed, in case of an *issue in fact*, by an order of court directing the *mode of trial*; or in case of an *issue in law* by an adjournment of the parties to a given day, when the judges would be prepared with their decision. (Steph. Pl. 24-'5; Id. (Tyler's ed.) 59, 60.)

Mr. Reeves, in his History of the English Law, gives what he justly calls a *juridical curiosity*, being the pleadings which *actually took place, viva voce*, in several cases in the reign of Edward II, exemplifying the manner of this *legal disputation*, and also the style in which it was *moderated* by the judges. Of this it will be worth while to give a specimen, which Mr. Reeves assures us corresponds strictly to the *original report*. The names of the judges and counsel are much abbreviated, and although Mr. Reeves hazards a conjecture as to who they are, we need not pause to indulge any curiosity on that point. (2 Hist. E. L. 344.)

One case is of an action where several pleas in *abatement* were successively overruled, and the fate of the cause was at length rested upon the *general issue*. The prior of *Leaton* brought a writ of trespass against the parson of Bangor, grounded upon the statute of Marlebridge (52 Hen. III, c. 28), which, when a trespass was done to the *goods of a religious house*, and the abbot or prior died before judgment, allowed the *successor* to maintain an action to *demand the goods out of the trespasser's hands*. The writ demanded of the defendant why, with force of arms, he took the goods and chattels of the plaintiff's *priory*, to the value of, &c., to his great damage, &c., and against the peace, upon which the plaintiff *counted* (*i. e.* declared), that the defendant *took some wool and lambs*.

Upon this *Herle*, one of the counsel for defendant, demanded judgment of the writ, and that it should be quashed, for that there was *no one form* of a count for *live and dead* chattels; and if he had wanted to count of *lambs* taken and carried away, he might have said *quare averia sua cepit et abduxit*.

To this *Brab.* (one of the judges) says, he has counted of

wool and lambs, which can be as well *carried* as *chased*, therefore, *respondeat ouster*.

Then *Herle*, (taking another ground), said: Again we demand judgment, because the defendant says, *bona et catalla domus et ecclesie*, &c., whereas the property is *not in the church, but in the prior*.

To this *Malm.*, for the plaintiff, said: Our writ is given by statute, and we have followed the statute, which was assented to by the court, and so a second *respondeat ouster* was awarded.

Then *Pass.* (another counsel for defendant), said: Again we demand judgment of the *form* of the writ, for the statute says a man should have recovery *ad bona repetenda*, (to regain the possession of the goods), and, therefore, the prior ought to have brought *detinue* or *replevin*, and not this writ, which goes wholly *for damages*.

To this *Malm.*, for the plaintiff, said: If the chattels were *dead or aliened*, should I have *no recovery*? and there was a third *respondeat ouster*.

Again says *Herle*: This writ is given by statute, to successors *after the death* of their predecessors; and we say, that the prior William, in whose time the alleged wrong is said to have happened, is *still alive*, and, therefore, we demand judgment of the writ.

Malm. says: He is dead as *to this action*, for he is deposed, and the action as *against him is extinct*; and he cites sundry analogies.

Then *Roubury* (one of the justices), said: If an abbot brought an action against an abbot, and the *defendant* was deposed pending the plea, the writ would not abate; but it is otherwise where such abbot is *plaintiff*, for then all *cause of action in him ceased*, and passed to his successor, and so he held the writ good in this point, and there was another, a *fourth* judgment of *respondeat ouster*.

Again *Pass.*, going back in substance to a former position, demanded judgment of the writ because it was a writ of *trespass vi et armis*, for a wrong done to divers persons, and the statute does not give a *recovery of damages*, but only *ad bona repetenda*.

But *Malm.* argued the writ was good for two reasons, *First*, Because the trespass was done in the time of our predecessors, for which trespass we are entitled to an action by the statute; *second*, Because of the *detinue* in our time.

Herle. Your writ has nothing to do with *detinue* of chattels, but is of a fact done with *force and arms to another person*.

Malm. (repeating his former argument): Suppose the chattels were dead or eloigned. I could not recover the things

themselves, and then my action must lie *in damages*, or I should have no recovery at all.

Harle. Yes, you might recover the alternative value.

West. (one of the justices) interposing, said, the force of their objection is, that a man shall not recover damages for a *trespass done to another*. But several instances may be cited where such a recovery is allowed. Thus, an executor may recover damages for a *trespass done to the property of his decedent*; and for waste done in my father's time, I shall have an action for waste and trespass.

To the first of these cases, it was replied for the defendant, that the *executors* recovered, not in their own right, but *in the right of another*; and to the second, that it was by statute, and not by the common law.

However, *Roubury* (another justice) said, they were all agreed that the writ was good, and, therefore, a fifth *respondent ouster*.

Upon this defendant pleaded *the general issue*, that they did nothing against the peace, *prist*, &c.; and so issue was joined.

Another instance is given where the parties went on to reply, rejoin, and sur-rejoin, but the student must be referred for it to 2 Reeve's Hist. Eng. Law, 347 & seq.

Mr. Reeves' concluding observation upon the subject is that the instances cited of *viva voce* pleading show, that "everything there advanced was treated as a matter only *in fieri*, which, upon discussion and consideration, might be amended or wholly abandoned, and then other matter resorted to, till at length the counsel felt himself on such ground as he could trust. Where he finally rested his cause, that was the plea which was *entered on the roll*, and abided the judgment of an inquest or of the court, according as it was a question of law or of fact." (2 Reeve's Hist. Eng. Law, 349.)

It may be observed, that these cases are cited from 1 Year-Book, 624, 634.

As the object of all judicial allegation, in every system of administering justice, is to ascertain the *subject for decision*, so the main object of that method of pleading established in the common law of England, is to ascertain it by the *production of an issue*, as it is rather inaccurately styled; that is, by narrowing the controversy, as has been described, at every successive allegation, *to a single point*, and thereby, of course, continually rejecting every irrelevant or superfluous averment. This appears to be peculiar to the common law, and to be unknown, in the present practice at least, of any other plan of judicature. In all courts, indeed, under all systems, the particular subject for decision must, of course,

be in some manner developed before the decision can take place; but the methods generally adopted for this purpose differ widely from that which belongs to the common law. (Steph. Pl. 124-'5; Id. (Tyler), 148.)

The modes of accomplishing this necessary result, besides that of the common law, resolve themselves into *but two*, of which one is only a modification of the other.

1st, Each party may narrate his story at large, and the tribunal, from the conflicting statements, may collect, as best it may, the real point or points of controversy. (Steph. Pl. 125; Id. (Tyler), 148.)

This plan, which is substantially that of the Roman law, is adopted in those courts which proceed according to the usages of that law, such as with us, the court of chancery. See Sand's Suit in Equity, 247, n *, for a ridiculous travesty of chancery pleading actually exhibited in *Mason v. Mason*, 4 H. & M. 414.

2nd, Each party may make his statement at large as before, with no other guide but the pleader's own native power of analytical arrangement and lucid narration; and then the parties, or their counsel, or or some official of the court, may be required *to review the statements*, and present to the court an abstract, showing the essential points to be decided. (Steph. Pl. 125; Id. (Tyler), 148.)

This method, it will be observed, differs from the first only in relieving *the judge* of the onerous task of comparing the narratives of the parties, and extracting thence the elements of the dispute, by devolving it upon persons who probably are less competent than he to perform it. This last method is that practised in the courts of Scotland.

The student will not fail to note the important particulars wherein the common law method of pleading differs from these, in obliging the parties themselves to *come to issue*; that is, so to plead as to develop some question (or issue) by the *effect of their own allegations*, and to *agree upon this question as the point of decision in the cause*, thus rendering needless any retrospective canvassing of the pleadings for the purpose of ascertaining the gist of the controversy. (Steph. Pl. 126; Id. (Tyler), 148-'9.)

The peculiar advantages of this common law method of pleading consists chiefly in these *three particulars*, namely :

1. It attains the end of pleading effectually, by causing the parties to come to an issue, step by step, *without confusion or mistake*.

The undisputed, or immaterial matter, which every controversy more or less involves, is cleared away by the *effect of the pleading itself*, and when the allegations are finished the

essential points are developed, as has been well said, *like the roots of an equation*.

2. It brings the parties to issue *upon a single point*, and with *definiteness and precision*.

3. It enables the parties to *anticipate the points* on which to be prepared for trial, and so to come provided accordingly.

The remarkable peculiarities of this mode of pleading are referred by Mr. Stephen to the following causes, namely:

1. The altercation was at common law originally *oral*, and this method was recommended by the important *aid it afforded to the memory*. (Steph. Pl. 126; Id. (Tyler,) 149.)

2. The modes of decision at common law, *were various* for different kinds of questions, and this system discriminated the *precise point of dispute*, and thereby determined what mode of decision was to be resorted to. (Steph. Pl. 127; Id. (Tyler,) 149-'50.)

3. Questions of fact were principally (although not invariably) determined at common law *by a jury*; and this system produced a *single issue*, or at least a *limited number of narrow and definite issues*, fit to be submitted to such a tribunal. (Steph. Pl. 127-'8, 133-'4; Id. (Tyler,) 150, 153-'4.)

To be sure each and all of these causes originally existed on the continent of Europe, as well as in England, and yet on the continent this method of altercation is now, and for centuries has been, unknown. But that is because on the continent the ancient Gothic judicature, of which these practices formed a part, was at an early period supplanted by the methods of the *Roman law*, in which the pleadings were *in writing*, and there was but one *form of trial* for all questions, viz: a trial *by the judge himself*, upon examination of documents, and the testimony of witnesses adduced before him. On the other hand, in the courts of Westminster Hall, as well as in Virginia, the *law of trial* remains without material alteration; and with respect to *oral pleading*, though grown out of fashion, yet it has given place, not to allegations formed upon the principles of the imperial practice, but to supposed transcriptions from the record. Thus preserving in the written pleadings the style and method of those formerly delivered *viva voce* at the bar of the court. (Steph. Pl. 128-'9; Id. (Tyler,) 150-'51.)

The *objects* of the common law mode of pleading have been already partially stated.

The primary purpose is to *produce an issue*, as we have seen; that is, a point affirmed on the one side, and denied on the other.

But this is not the only purpose. A *secondary* object is to impart to the issue, *without obscurity or confusion*, and with-

out *prolixity or delay*, the qualities of *singleness, certainty*, (or *particularity*), and *materiality*, the necessity for which is obvious enough, and for a further exposition of which the student is referred to Mr. Stephen's text. (Steph. Pl. 130 & seq; Id. (Tyler,) 151 & seq.)

The nature of pleading at common law, and as it is now conducted substantially in Virginia, may be illustrated by the following—

ABSTRACT OF PROCEEDINGS IN A SUPPOSED CAUSE.

A. holds a bond of Z.'s for \$1,000, on which he proposes to institute suit by causing Z. to be summoned to answer his complaint, which purports to be a *plea of debt*. At the return-day of the summons, (supposing it to be returned "*executed*,") and from time to time afterwards, the following altercations and proceedings might occur:—

Declaration.

A.—This man Z. owes me \$1,000, as appears by his bond here, which I now *produce to the court*, yet he has not paid me.

Oyer.
Pleas.

Z.—Let me *hear it read*!

I say it does not bind me:

1, Because I was an *infant* when I executed it;

2, Because it was founded on an *usurious consideration*;

3, Because it is *not my deed*; and

4, Because the plaintiff afterwards *released* the bond to me by this writing here, *under his seal*, which I now *produce to the court*.

Demurrer to Pleas.

A.—Stop! I say you cannot make more than *one distinct answer* to my demand; and I submit it to the court.

Joinder in Demurrer.

Z.—Let the court say!

Judgm't on Demurrer.

COURT.—Defendant *by the common law*, (it is otherwise by statute,) can make *only one answer*.

Deft. relies on 4th plea.

Z.—Then I rely *on the fourth*,—the release.

Replication.

A.—I say that the so called release does not bar my demand:

1, Because it was obtained from me by *duress of violent threats*;

2, Because I delivered it to W. *as an escrow*, to take effect only on condition that Z. should deliver me a horse the next day, which he did not do.

Demurrer to Replicat'n.

Z.—Stop! I say you cannot make more than *one distinct answer* to my plea; and I submit it to the court.

- Joinder in Demurrer. A.—Let the court say!
- Judgm't on Demurrer. COURT.—Plaintiff is not permitted by the law to make *more than one answer*.
- Plaintiff relies on second Replication. A.—Then I rely *on the second*,—that the so-called release was delivered by me as an *escrow*.
- Rejoinder. Z.—I offered to deliver the horse, and you refused to receive it.
- Demurrer to rejoinder. A.—Stop! I admit that you offered to deliver the horse, and that I refused to receive it; but I say that that is not a sufficient answer to my replication, for you do not say that you have *ever since been ready* to deliver it; I submit it to the court, if that is not necessary.
- Joinder in Demurrer. Z.—Let the court say!
- Judgment (*quasi*) on Demurrer. COURT.—I am inclined to think *it is not necessary*; but I will take time to consider.
- Demurrer withdrawn with leave. A.—I will not trouble the court to consider it; but with its permission, I will withdraw my objection to the rejoinder, and answer *to the fact*.
- Leave Given. COURT.—Leave is given *of course*.
- Sur-Rejoinder and Issue tendered. A.—I say that the defendant did not offer to deliver me the horse as he has said; and I *submit it to the country*.
- Similiter and Issue. Z.—And I *do the like*.
- Jury impannelled. And thereupon comes a jury, to wit Wouter Van Twiller, and eleven others, who being duly elected, tried and sworn the truth to speak upon the issue joined, upon their oath do say that the said Z. did not offer to deliver the horse to the said A. as the said Z. hath in pleading alleged, and, therefore, they find for the plaintiff the debt in the declaration mentioned, with lawful interest from the 1st day of January, 18—, until paid. Wherefore it is considered by the court that the plaintiff recover against the defendant, the sum of one thousand dollars, with interest thereon, after the rate of *six per centum per annum*, from the 1st day of January, in the year of our Lord eighteen hundred and — until paid, and his costs by him about his suit in this behalf expended; and the said defendant in mercy, &c.
- Verdict.
- Judgment.

It is so important to familiarize the student with the actual employment of the dialectics of pleading, that abstracts are subjoined of two or three cases taken from Saunders' Reports, the great treasure-house of the doctrines and processes applicable to this branch of the law. Pains have been taken to

divest the statements of the facts, and the alternate allegations of the parties, as far as possible, of technicalities, so that it is hoped the reader will not find it very irksome to give careful heed to these illustrations.

1. *Nicholas Jevens vs. Rowland Harridge, and Johanna his wife*—In Debt. (1 Saund. 1.)

Reve Levemere, a French alien artificer, on the 26th Nov., 1663, by indenture, leased of Nicholas Jevens certain premises in London, described as a "*brick messuage or tenement*," for seven years from Christmas following, at an annual rent of £20. Levemere entered upon the premises pursuant to the lease, and 30th Sept., 1665, he died intestate, whereupon administration of his estate was committed to Johanna, wife of Rowland Harridge, and she and her husband immediately took possession of the premises, in pursuance of the lease and the grant of administration, and were possessed thereof. On the feast of *Annunciation*, (25th March,) 1666, £10 rent was in arrear, and for that Jevens brought this action of debt.

The pleadings were in substance as follows:

Declaration:

N. J. demands of R. H. and J., his wife, administratrix of R. L., deceased, £10, which they *owe to* and detain from him; for that plaintiff, on the 26th November, 1663, was seised in fee of a *messuage* in London, and on that day by indenture (now shown to the court,) leased the said *messuage* to R. L. in his life-time, for seven years from 25th December, 1663, at the yearly rent of £20, payable at the four usual feasts, namely, the *Annunciation* (25th March); the *nativity of John the Baptist* (24th June); *St. Michael* (29th September); and the *nativity of Christ* (25th December), of each year, and R. L. entered and was possessed of the messuage accordingly, and died possessed 30th September, 1665. The same day administration of R. L.'s estate was duly granted to the defendant, Johanna, and she and her husband, R. H., immediately entered upon the messuage, and was possessed of the same, pursuant to the lease and the grant of administration; and the said £10 for the rent of the messuage for a half year, ending 25th March, 1666, were, and yet are, in arrear and unpaid, whereby an action has accrued to the plaintiff to demand of the defendants the said £10. Yet the defendants have not paid to the plaintiff the said £10, but to pay the same have refused, and still do refuse, to the plaintiff's damage, £5, and therefore he brings his suit.

Plea:

The said defendants come and crave *oyer* of the said indenture of lease, and it is read to them in these words [in-

indenture copied *verbatim*,] which, being read and heard, the defendants say that the plaintiff ought not to maintain his action against them, because they say that by statute 32 Henry VIII, c. 16, all leases of *any dwelling house or shop* to an *alien artificer* are declared to be void, and that at the time of the demise R. L. was an alien and an artificer, and so the said lease was void. And this the defendants are ready to verify. Wherefore they pray judgment if the plaintiff ought to maintain his action against them.

Demurrer to Plea :

And the said plaintiff says that the said plea is not sufficient in law.

Joinder in Demurrer :

And the said defendants say that the said plea is sufficient in law.

Curia vult Advisare :

And the court not being advised of the judgment to be rendered in the premises, takes time until Monday next to consider thereof, until which day is given the parties, &c.

Judgment :

And on that day came the parties, by their attornies, and the matters of law arising upon the plaintiff's demurrer to the plea being argued, it seems to the court that the said plea is not sufficient in law to bar the plaintiff's demand. Wherefore it is considered by the court, that the plaintiff recover against the defendants £10, the debt in the declaration mentioned, and his costs by him about his suit in this behalf expended.

The question involved in the demurrer was whether, as the defendant had not said in his plea that the house leased was a *dwelling*, it was sufficiently showed to be such by being styled a *messuage* in the indenture, and in the declaration, and so was within the statute. The defendants insisted that the word *messuage* meant only a dwelling; to which the plaintiff responded, that although it might, and did mean a dwelling, in *conveyances*, so as to pass a dwelling, that in pleading the word was allowed to describe not a dwelling only, but also sundry premises which were not dwellings, *e. g.* stables, barns, chapels, &c., of which instances were cited; and so the plea did not necessarily bring the case within the statute.

Twysden and Wyndam, Js., were of this opinion; Kelynge, C. J., thought otherwise; and Morton, J., hesitated. The defendants, believing that the judgment would be against them, paid the rent and charges, and so, in point of fact, no judgment was given, although one is supposed, for the purpose of completing the illustration.

The action is in the *debet* as well as in the *detinet*, although the action is against personal representatives, because the rent

accrued during the occupancy of the defendants, who are, therefore, liable *de bonis propriis*, (2 Lom. Ex. 441; Bac. Abr. Ex'ors, (P.) 1); and so, consequently, is the judgment.

2. *Henry Hawe v. John Planner*—In Trespass *vi et armis*. (1 Saund. 10.)

Henry Hawe, on Sunday, August 21, 1664, was at church in the parish of Wokingham, and during the service kept his hat on, when John Planner, who was one of the church-wardens, requested him to take his hat off, which Hawe refused to do; whereupon Planner took it off, and Hawe brought this action.

The pleadings were substantially thus :

Declaration :

H. H. complains of J. P. of a plea of trespass, for that he on the 4th *September*, 1664, with force and arms, made an assault upon the plaintiff, and beat, wounded, and ill-treated him, so that his life was greatly despaired of, and other wrongs to him did, against the peace of the king, and to the damage of the plaintiff, £700; and therefore he brings his suit.

Pleas :

And the said defendant, by his attorney, comes and says that—

Not guilty, 1. As to the force and arms, and as to the wounding, in the declaration supposed, he is not guilty, and thereof he puts himself upon the country.

Justification, 2. And as to the residue of the trespass in the declaration supposed, the defendant says, that the plaintiff ought not to maintain his action against him, because he says, that before, and at the time of the supposed trespass, the defendant was one of the church-wardens of the parish of Wokingham, duly elected and appointed, and the plaintiff was an inhabitant of the said parish; and that before the time of the supposed trespass, to wit: on the 21st *August*, 1664, being Sunday, the plaintiff was in the church of the said parish during the time of divine service; and when prayers were made, irreverently had his head covered with his hat, whereupon the defendant, as church-warden, admonished and requested him to uncover his head, which the plaintiff refused and neglected to do; and thereupon the defendant took his hat from his head, as it was lawful for him to do; and this is the same assaulting, beating, and ill-treating of which the plaintiff complains; *without this*, that the defendant is guilty of the said assaulting, beating, or ill-treating on the 4th *September*, or at any other time than on the said 21st *August*, 1664, or otherwise, as the plaintiff com-

plains. And this the defendant is ready to verify. Wherefore he prays judgment, if the plaintiff ought to maintain his action against him.

Replication:

And the said plaintiff, by his attorney, comes and says that—

Joinder of issue as to first plea, 1. That, as to the first plea of the said defendant, whereof he hath put himself upon the country, the plaintiff *doth the like*.

Demurrer to second plea, 2. And that as to the second plea of the said defendant, the same is *not sufficient in law*.

Rejoinder:

And the said defendant, by his attorney, comes and says that—

Joinder in demurrer to second plea. The said second plea is *sufficient in law*.

Curia vult Advisare:

And the court not being advised of the judgment to be rendered in the premises, takes time until Friday next to consider thereof, until which day is given the parties, &c.

Judgment:

And on that day came the parties, by their attornies, and the matters of law arising upon the plaintiff's demurrer to the defendant's second plea being argued, it seems to the court that the said second plea is sufficient in law to bar the plaintiff from maintaining his action. Therefore it is considered by the court that the plaintiff *take nothing by his bill*, but for his false clamor be in mercy, &c., and that the defendant go thereof without day and recover against the plaintiff his costs by him about his defence in this behalf expended.

Upon the demurrer, it was argued that the plaintiff's irreverent behavior was only punishable in the ecclesiastical court, and did not justify the church-warden in pulling off the hat, because that tended to a breach of the peace. One judge (Twysden) was of that opinion, but the others were of opinion that the defendant acted legally.

The form of the second plea was also objected to, in that the defendant had *traversed* (or denied) the battery on the 4th *September*, as alleged by plaintiff, when he ought to have *justified* on that day without any traverse; for in effect it was a denial of the *time* stated by the plaintiff, which was immaterial; and it was further objected, that taking off the plaintiff's hat was no battery, and so the plea *neither confessed nor justified anything*. But neither objection prevailed, although the first might have been sustained on *special demurrer*. The second had no force, for taking off the hat, if it had been unlawful to do it, *was a battery*, as is any unlawful

imposition of hands, and so the plea did substantially confess and avoid the plaintiff's action.

3. *John Birks v. Burrowes Trippet*—In Trespass on the case in assumpsit. (1 Saund. 28, c.)

John Birks, a Yorkshire-man, having a claim against one Burrowes Trippet, an attorney, for pasturing a horse and certain cattle, and for doctoring the cattle, and also for a *beating* which Trippet had given him, the parties agreed to submit the matters of difference between them to the arbitrament and award of one Francis Barker, and entered into a writing to forfeit mutually £40, or to stand to his award. Barker made his award, that Trippet should pay Birks 10s. for the beating, 20s. for curing a horse, 10s. for curing an ox, and £4 for his law-expenses, in all £6; whereupon mutual releases were to be executed, and Trippet was to deliver to Birks a *certain fine* between him and one Mariot. Trippet refused to abide by the award, upon the ground that the arbitrator had been guilty of mis-conduct in not considering and allowing a claim for attorney's services, amounting to £4, which he asserted against Birks; and thereupon Birks brought this action.

The pleadings, &c., were in substance as follows:

Declaration:

J. B. complains of B. T. of a plea of trespass on the case in assumpsit for this, to wit: that whereas divers quarrels and disputes were depending between the plaintiff and defendant, in order to make a final determination thereof, and of all other causes of action then depending between them, they mutually agreed, 14th April, 1666, at Doncaster, in Yorkshire, to submit to the award of Francis Barker upon the premises. And afterwards, on the same day, in consideration of the premises, the defendant promised the plaintiff, that if he did not stand to Barker's award, he would pay the plaintiff £40 whenever he *should be thereto required*. That the arbitrator, 21st April, 1666, awarded that defendant should pay plaintiff 10s. for damages sustained by plaintiff in an action of trespass and assault against defendant; 20s. for pasturing defendant's horse; 10s. for keeping and curing certain cattle of defendant; and £4 for plaintiff's costs at law about the divers differences between the parties; which sums, amounting in all to £6, defendant was to pay plaintiff, 23rd April, 1666, at a place named. And also that defendant should deliver to plaintiff a *certain fine* between plaintiff and one Mariot. And also that plaintiff should desist from further prosecution of defendant at the general sessions of the peace. And that the parties should mutually execute

general releases to one another. Plaintiff avers, that although he has performed the said award in every particular on his part, yet that the said defendant has not paid the said £8, nor any part thereof, according to the award, nor delivered the fine; nor has he paid to the plaintiff the said £40, as he agreed to do, to the damage of plaintiff £100, and therefore he brings his suit.

Plea:

And the said defendant, by his attorney, comes and says, that the said plaintiff ought not to maintain his action, because he says that it is true he agreed to stand to the award of the said Francis Barker, as the plaintiff states; but that before Barker made his award, to wit, on the 20th April, 1666, the plaintiff was indebted to him £4 for attorney's fees, which the said defendant on that day *made to appear* to the arbitrator, and requested him to allow it; but the said arbitrator made his award on the 20th April, 1666, without considering or allowing his said demand. And this the said defendant is ready to verify. Wherefore he prays judgment if the said plaintiff ought to maintain his action against him.

Replication:

Demurrer to plea. And the said plaintiff, by his attorney, comes and says that the said plea *is not sufficient in law*.

Rejoinder:

Joinder in Demurrer. And the said defendant, by his attorney, comes and says that the said plea *is sufficient in law*.

Curia vult Advisare:

And the court not being advised of the judgment to be rendered in the premises, takes time until Tuesday next to consider thereof, until which day is given the parties, &c.

Judgment:

And on that day came the parties by their attorneys, and the matters of law arising upon the plaintiff's demurrer to the defendant's plea being argued by counsel, it seems to the court that the *declaration of the said plaintiff is not sufficient in law*. Wherefore it is considered by the court that the plaintiff take nothing by his bill, but for his false clamor be in mercy, &c., and that the said defendant go thereof without day, and recover against the plaintiff his costs by him about his defence in this behalf expended.

It is an established rule that, upon a demurrer, the court is to consider the *whole record*, and to give judgment for the party who upon the whole appears to be entitled to it. (St. Pl. 144.) The court here, therefore, although the plea was undoubtedly bad,—being virtually an appeal from the judgment of the arbitrator, which, for the most part, is final,—yet was obliged to give judgment against the plaintiff upon

the declaration, the defect in which consisted in not having averred an *actual request* to defendant to pay the £40. If one promise to pay *upon request* a debt already due, no request is requisite; but where the promise is to pay a collateral sum, as in this case, on request, there is no precedent duty, and an actual request must be made before any cause of action arises, and of course such request must be averred. (1 Saund. 33 a & n (2); Selman v. King, 3 Cro. (Jac.) 183; Hill v. Wade, Id. 523; Waters v. Bridge, Id. 639.)

2°. The History of Pleading.

It appears from Glanvil (A. D. 1187), and from Bracton (A. D. 1263), that during the reigns of Henry II, (from A. D. 1154 to A. D. 1189), of Richard I, (from A. D. 1189 to 1199), of John (from A. D. 1199 to 1216), and of Henry III, (A. D. 1216 to 1272), very little order or science prevailed in the practice of pleading. But in the time of Edward I, (A. D. 1272 to 1307), there seems to have been a sudden and marked advance. From a record cited by Mr. Reeves of 21 Edward I, (A. D. 1293), we find the *narratio* or declaration drawn with form and precision, and liable to be excepted to if deficient in either of those qualities, (2 Reeves' History of the English Law, 264 to 266); and the year-books (reports *annually* published) of Edward II's time, prove not only that the fundamental principles of pleading had become well established, but that many of its more subtle and artificial rules were beginning to be observed, (St. Pl. (Tyler,) App'x, xxxvi, &c. n 38.) And the system thenceforward continued to advance until the reigns of Henry VI, (A. D. 1422 to 1461), and Edward IV, (A. D. 1461 to 1483), when it was cultivated with such industry and success as to raise it to a sudden perfection in a few years. (3 Reeves' Hist. Eng. Law, 424.) It was in the latter reign that Littleton took occasion in his "*Tenures*" to speak of it thus: "And know, my son, that it is one of the most honorable, laudable, and profitable things in our law, to have the science of *well-pleading* in actions real and personal; and, therefore, I counsel thee especially to employ thy courage and care to learn this." Upon which Lord Coke delivers this comment: "Here is to be observed the excellency of good-pleading, and Littleton's grave advice that the student should employ his courage and care for the attaining thereof, which he shall attain unto by these means: first, by *reading*; secondly, by *observation*; and thirdly, by *use and exercise*. For in ancient times the sergeants and apprentices of the law did draw their own pleadings, which made them good pleaders. And in this sense *placitum* may be derived from a *placendo, quia omnibus placet!*" (3 Th. Co. Lit. 376.)

Coke indeed refers the perfection of the art of pleading to the reign of Edward III, (A. D. 1327 to 1377), instead of as stated above, upon the authority of Mr. Reeves, to the times of Henry VI and Edward IV, (A. D. 1422 to 1483); and in that Sir M. Hale concurs with Coke, (Hale's Hist. Com. Law, 212). "In the reign of Edward III," says Coke, "pleadings grew to perfection *without lameness and curiosity*." And Lord Hale observes, that though pleadings in the time of Henry VI, Edward IV, and Henry VII, (A. D. 1422 to 1509) were "far shorter than afterwards, especially after Henry VIII, (A. D. 1509 to 1547), yet they were much longer than in the time of King Edward III; and the pleaders, yea and the judges too, became somewhat *too curious* therein. So that art or dexterity of pleading, which in its use, nature, and design, was only to *render the fact plain and intelligible, and to bring the matter to judgment with a convenient certainty*, began to degenerate from its primitive simplicity and the true use and end thereof, and to become a piece of *nicety and curiosity*." (Hale's Hist. Com. Law, 212.) And Lord Hale accounts for this needless length and nicety in part, by the fact that the pleadings were mostly drawn by clerks, who were paid in *proportion to their length*, and, therefore, took care not to study brevity. (Hale's Hist. Com. Law, 213.)

These faults in the system of pleading were not undiscerned nor undeplorable, and from time to time the legislature essayed to remedy them, timidly and imperfectly enough, it must be admitted, until the statute 3 & 4 Wm. IV, c. 42, delegated to the judges the task of reform. (St. Pl. (Tyler,) Pref. x. vi; St. Pl. (Ed. 1845,) 452 & n (39); Id. Pref. iii.) In pursuance of this statute, the judges promulgated the *rules of court of Hilary term*, 4 Wm. IV, (A. D. 1834), which effected important changes in the rules and forms of pleading. Amongst other reforms those rules did away with certain loose forms of statement in pleas, known as the *general issues*, and substituted therefor more specific allegations, better adapted to the object of ascertaining with definiteness, the subject of dispute. (St. Pl. (Ed. 1845,) 156; Id. App'x, lvi. & seq. n (44).) They also introduced certain other provisions tending to *abbreviate the pleadings*, by allowing the omission of *merely formal allegations*, and the like (Ibid); and most of these *latter* (but unfortunately *not the former*.) have found a place in our Code. (V. C. (1873,) c. 167, § 18 to 31.) But see V. C. 1873, c. 172, § 49.

But in New York, Missouri, Alabama, Mississippi, South Carolina, Georgia, Arkansas, Texas, and doubtless in other States, and strange to say, in England also, the common law

system of pleading has received a shock so severe as well nigh to overthrow it altogether. (3 Rob. Pr. (2nd ed.) 485, 487, 490.) But even in those States the practitioner will derive not a little aid from an acquaintance with the principles of logical analysis, and rigorous precision of thought and expression inculcated by the method of the common law, whose superiority has often been vindicated by the judges engaged in administering the new system. Thus, Chief-Justice Gibson, of Pennsylvania, (where the pleading has been very loose for more than fifty years), declares that known modes of proceeding according to the common law, *ought never to be changed*, but to avoid some practical mischief or serious inconvenience. (2 Penrose & Watts, 494.) And in another case in the same State, Ross J. testifies still more decidedly to the mischiefs arising from a departure from the common law. "It is much to be regretted," says he, "that such laxity of pleading has ever been tolerated, more especially when the case involves the solution of important and complicated questions." "To the act dispensing with common law pleading," he adds, "*professional indolence or negligence* has frequently resorted, as an easy mode of avoiding the trouble necessary to such a perfect understanding of the case as would be requisite to adapt the declaration or pleas to the particular circumstances existing in it." So yet another distinguished Pennsylvanian judge (Duncan,) thought the act abolishing pleading a *fruitful source of writs of error*. (8 Serg. & R. 265.)

But unhappy in its effects as the Pennsylvanian statute is, it is said that all the reported cases arising under it for *half a century*, fall short of those which arose under the New York "*Code of procedure*" in *five years*. (3 Rob. Pr. (2nd ed.) 490.) One of the New York judges speaks of it as a "new and untried way," (Haire v. Baker, 1 Seld. 363), and others rejoice at having discovered that the legislature intended to preserve as many of the rules of the common law as are consistent with the new forms of pleading. (Knowles v. Gee, 8 Barb. 305.)

In Kentucky also, which has recently manifested some disposition to return to the common law, it is held, that whilst the distinction between the several kinds of actions is abolished, even as between those founded *in tort*, and those founded *in contract*, yet what facts do constitute a cause of action is determined by the general rules or principles of law, respecting rights and wrongs, and by a long course of adjudication and practice, applying those rules to particular actions under the long established rule of pleading, that the declaration *must state the facts which constitute the cause of*

action. (Hill v. Barrett, &c., 14 B. Monroe, 85; 3 Rob. Pr. (2nd ed.) 492.)

The Texas system has called down a yet severer stricture from a yet higher source. The supreme court of the United States, in a case which came up from the district court of the United States for the district of Texas, animadverts thus upon it: "Had this case been conducted on the principles of pleading and practice known and established by the common law," says Mr. Justice Grier, delivering the opinion of the court, (being himself a *Pennsylvanian jurist*, and, therefore, not a stranger to the merits and demerits of the new procedure), "a short declaration *in assumpsit*, a plea of *non-assumpsit*, and of *non-assumpsit infra sex annos*, would have been sufficient to prepare the cause for trial on its true merits. But unfortunately the district court (of Texas) has adopted the system of pleading and code of practice of the State courts; and the record before us exhibits a most astonishing *congeries* of petitions and answers, amendments, demurrers, and exceptions,—a wrangle in writing extended over *more than twenty pages*, and continued *nearly two years*, in which the true merits of the case are overwhelmed and concealed in a mass of worthless pleadings and exceptions, presenting some *fifty points*, the most of which are wholly irrelevant, and serve only to perplex the court, and impede the due administration of justice. The merits of the case, when extricated from the chaos of demurrers and exceptions in which it is enveloped, depend on two or three questions, simple and easily decided." (Randon v. Toby, 11 How. 517.)

3°. The *Alternate Allegations* in Pleading.

The pleadings are conducted, as we have seen, by each party making his statement alternately, subject to certain rules which are intended to impart to the issue (which it is one principal object to *produce*,) the qualities of *materiality*, *singleness*, and *certainity*, and to avoid at the same time both *obscurity* and *prolixity*. To several of the most usual of these alternate allegations distinctive names have been given, thus:

The plaintiff's complaint is styled the *declaration*—in Latin, *narratio*, (often abbreviated to *narr'o*,) and in Norman French, *conte*.

The defendant's answer to the complaint or declaration is denominated the *plea*.

The plaintiff's reply to the *plea*, is the *replication*.

After which come, in succession, the *rejoinder* and *sur-rejoinder*, the *rebutter* and *sur-rebutter*.

Thus the plaintiff's pleadings, as far as they have distinct names, are the *declaration*, the *replication*, the *sur-rejoinder*, and *sur-rebutter*; and those of the defendant are the *plea*, the *rejoinder*, and the *rebutter*.

It may possibly happen that the altercation will extend beyond a *sur-rebutter*, although in practice it very seldom goes so far; but no names are assigned to any subsequent pleading. An issue is commonly arrived at upon the *replication*, at farthest.

It is proposed now to make such explanations as may be necessary touching each of these parts of the pleading.

W. C.

1^d. The Declaration.

This, we have seen, is called in Latin, *narratio*, and in French, *conte*. The latter phrase is to this day familiarly used in *real actions* as a *synonyme* for declaration; and in *personal actions* it is employed to designate the several varying statements of the cause of action, which, in order to meet different possible phrases of proof, are sometimes introduced, under the name of *counts*, into one declaration.

These *counts* will be illustrated in due time by copious forms.

At present let us enquire, (1), When and where the declaration is to be filed; (2), The proceedings by the defendant when the declaration is not duly filed; (3), The form of the declaration; and (4), The doctrine touching office judgments;

W. C.

1^o. When and Where the Declaration is to be Filed.

The declaration is to be filed in the *clerk's office* of the court where the suit is instituted, *on the rule-day* to which the process is returnable; or if it be returnable *in term*, at the first rule-day after the return-day; (V. C. 1873, c. 167, § 5; *Kyles v. Ford*, 2 Ran. 3;) or in *ejectment*, *in term*. (V. C. 1873, c. 131, § 12.)

And at the same time the plaintiff gives the defendant a *rule to plead*, as it is called, which consists simply in a *memorandum* entered by the clerk, as of course in the rule-book, requiring the defendant to plead at the *next rules*, or if in *ejectment*, the declaration be filed, as it may be, *in court*, the order requires the defendant to appear and plead *within such time as may be prescribed* by the court. (V. C. 1873, c. 131, § 12.) Of this rule or order the defendant, in all other actions than *ejectment*, is bound to take notice, as he is also of all that passes in court or at rules, after he has been once summoned, and we shall see presently the consequence of his disregarding this obligation. In *ejectment*, for a reason not perceived, (unless it be out of regard to the value attached to real property,) the *rule must be served on the defendant* before any further proceedings can be had against him. (V. C. 1873, c. 131, § 1.) Nor is it al-

allowable to enter a *common order*, or any other *rule*, against a defendant until the declaration *is filed*. (Waugh v. Carter, 2 Munf. 383.) And a writing which, although it purports to be a declaration, yet leaves blank the sums, date of contract, and damages, is tantamount to *no declaration at all*. (Blane v. Sansum, 2 Call. 495.)

2°. Proceedings by Defendant, when *Declaration is not duly Filed*.

Let us now, for a moment, direct our attention to the *defendant*. If he wishes to be prompt in making his defence, he may enter his appearance with the clerk, upon the rule-book, at the time when the declaration *ought to be filed*; and if it be not filed accordingly, he may give the plaintiff a *rule to declare*; and if the plaintiff fails, in compliance with that rule, to file his declaration at the succeeding rule-day, or if at any time after defendant's appearance the plaintiff fails to prosecute his suit, he is *non-suited*, and pays to the defendant \$5 damages, besides his costs. (V. O. 1873, c. 167, § 5.) It is customary, however, for the court, upon application of the plaintiff, before the end, or before the 15th day of the next term, (whichever shall first happen), to set the *non-suit* aside. (V. O. 1873, c. 167, § 45, 52; Lipscomb's Adm'r v. Littlepage, 1 H. & M. H. 63; Southall v. Exchange Bank, 12 Grat. 315.)

And yet further, to prevent neglect on the part of plaintiffs in maturing their causes, it is provided that if *three months* elapse after the process is returned "*executed*" as to one or more of the defendants, without the declaration being filed, the clerk shall *enter the suit dismissed*, although none of the defendants may have appeared (V. O. 1873, c. 167, § 6); but if, before the clerk performs this duty, and actually enters the order of dismissal, the declaration is filed, and defendant pleads to it, without insisting upon the dismissal of the action, he thereby *waives the objection*. (Buchanan v. King's Heirs, 23 Grat. 418.)

3°. The Form of the Declaration.

The next inquiry relates to the *form of the declaration*, under which head we must notice, (1), The parts of which a declaration consists; (2), The general principles to be observed in constructing it; and (3), Two or three illustrative specimens of declarations;

W. O.

1°. The Parts of which a Declaration consists.

A competent apprehension of the nature and object of the several parts of a declaration, or other pleading, will materially assist the practitioner in that *analysis* of the forms to which he must aspire, and will not only enable

him occasionally to dispense with a *form-book*, when one is not accessible, but will put it into his power to subject his adversary's pleadings to a critical examination, and even to correct the form-books themselves.

The parts of which a declaration consists, are (1), The *title of the court*, and *statement of the rules* when filed; (2), The *queritur*, or statement of the general nature of the action; (3), The *formal statement of the cause* of action, with particulars; (4), The *breach* (where the action is *ex contractu*); and (5), The *production of suits*; W. C.

1st. The *Title of the Court* and Statement of the Rules, when the Declaration is Filed.

It is an ancient rule of the art that all pleadings shall be properly entitled of *the court*, and also of the *term* at which they are filed; and by the Rules of Hilary Term, 3 William IV (1834), in England, they are required to be entitled of the *day of the month and year* when they are pleaded. (St. Pl. (ed. 1845), 441); 1 Chit. Pl. 291); St. Pl. (Tyler's ed.) 383.)

The reason for requiring *the court* to be stated seems to be simply in order to determine from the internal evidence of the pleading itself, without troubling the officers of the court *where it belongs*, so as to avoid confusion. The purpose in requiring *the term*, and more recently the *very day* of filing to be stated, would appear to be to prevent a cause of action from being embraced in the suit which accrued after the action was instituted. (1 Chit. Pl. 292.)

The rule in Virginia is, that all pleadings must be properly entitled *of the court, and of the rules at which they are filed*, (1 Rob. Pr. (1st ed.) 152), although it is quite common to omit the *rules*, whereby there is devolved upon the clerk the necessity of noting upon the pleading *when it was filed*,—a task which, if there was, much business in the court, might be extremely onerous. See 2 Tuck. Com. 248.

2nd. The *Queritur*.

The function of the *queritur*, (so called because that was the significant *Latin word* of the clause), is to set out the names of the *parties*, plaintiff and defendant, with a *general description* of the nature of the complaint, as that it is a "*plea of debt*," a "*plea of covenant broken*," a "*plea of detinue*," a "*plea of trespass on the case in assumpsit*," &c.

In describing the *parties*, the character in which they sue, or are sued, must be set out, according to the fact,

as if either plaintiff or defendant be an executor or administrator, or several plaintiffs or several defendants be *partners in trade*, and the names of all must be stated in full.

For example, executors are named thus: "P. P. executor of the last will and testament of E. P., deceased;" and administrators thus: "P. P. administrator of all and singular the goods, chattels, and credits which were of E. F., deceased, at the time of his death, who died intestate." An administrator *de bonis non* is named thus: "P. P. administrator of all and singular the goods, chattels, and credits which were of E. F., deceased, at the time of his death, who died intestate, left unadministered by G. L. in his life time, now deceased, which said G. L., in his life time, and at his death, was the administrator of all and singular the goods, chattels, and credits which were of the said E. F., deceased, at the time of his death." And an administrator *de bonis non*, with the will annexed, is described thus: "P. P. administrator (with the last will and testament of E. F., deceased, annexed,) of all and singular the goods, chattels, and credits which were of the said E. F., deceased, at the time of his death, left unadministered by W. M. and G. L. in their life time, now respectively deceased, and which said W. M. and G. L. in their lifetime and at their deaths, were the executors of the last will and testament of the said E. F., deceased." (2 Chit. Pl 34, 35.)

An *infant*, who sues by his *prochein ami*, or next friend, is named thus, "P. P. by E. G., who is by the court admitted to prosecute here for the said P. P. (who is an infant under the age of twenty-one years), as the *next friend* of the said P. P., complains," &c. (2 Chit. Pl. 32.)

Partners in business must be *named in full* severally, and it is not enough to designate them by their *partnership style*; and names in all cases should be stated fully, and not merely by *initials*, except perhaps the middle name may be so stated; at least it is usual and proper to do so. A partnership is set forth as "P. P. and G. M., partners in trade under the style and firm of P. P. and company." (1 Rob. Pr. (1st ed.) 142; Totty's Ex'or v. Donald & Co., 4 Munf. 430; Pate v. Bacon & Co., 6 Munf. 299; Barnett v. Watson, 1 Wash. 372; Deneale v. Stump, 8 Pet. 526; Davenport v. Fletcher, 16 How. 142; The Protector, 18 Wal. 86.)

Where there are several defendants in an action *ex contractu*, the rule of the common law requires that all

shall be summoned, either actually or constructively, by prosecution to *outlawry*, before the declaration can be filed or judgment can be had against any. (1 Tidd's Pr. 420, &c.; Sheppard v. Baillie, 6 T. R. 328; Bovill v. Wood, 2 M. & S. 23; Saunderson & als v. Hudson, 3 East. 144; Barton v. Petit & als, 7 Cr. 194.) And this rule, although it had been long disused in Virginia, (Moss & als v. Moss' Adm'r, 4 H. & M. 293; 1 Rob. Pr. (1st ed.) 258, 259;) was finally asserted as that which must regulate proceedings with us, (Early v. Clarkson's Adm'r 7 Leigh, 83,) when the Legislature interposed, and enacted that where in an action against two or more defendants, the process is served on part of them, the plaintiff may proceed to judgment, (and of course, therefore, may file his declaration,) as to any so served with process, and may either discontinue his suit as to the rest, or take judgment against them as the process is served. (V. C. 1873, c. 167, § 50; Bush v. Campbell, 26 Grat. 439.) And upon the judgments, as they are severally obtained, execution issues just as if each party were the only defendant in the case. (1 Rob. Pr. (1st ed.) 259, &c.; Moss v. Moss, 4 H. & M. 293, note.)

It is not difficult to see that the rule thus prescribed by statute may involve considerable embarrassment in cases easily supposable. Thus, if there be three joint promisors, A. B. and C. who are sued jointly, and the process being served with various degrees of promptness, judgment is obtained against them, not at one, but at successive times, and execution is issued against A. first, and partial satisfaction obtained, whilst B. confesses judgment, although no execution issues, and C. successfully contests the suit upon grounds which would go to discharge A. and B. as much as himself; doubtless the judgment against B. is annulled; but is the judgment obtained against A., and partly satisfied, thereby avoided; and if so, may A. compel the creditor to refund what he has received upon the execution? When it is considered that the common law doctrine still remains in its primitive vigor, that upon a joint action against several joint contractors, the plaintiff must recover against all or none, unless the defence upon which some are discharged is merely personal to them that plead it, and does not touch the liability of the other defendants; as for example, the plea of infancy, bankruptcy, *non est factum*, *non assumpsit*, and the like, which will not prevent the action from being renewed against the others, so as to recover against them only, (V. C. 1873, c. 173,

§ 19; *Steptoe v. Read*, 19 Grat. 1; *Moffett v. Bickle*, 21 Grat. 280; *Bush v. Campbell*, 26 Grat. 427 & seq.; *Muse v. Farmer's Bank*, 27 Grat. 254 & seq.); when due weight is given to this consideration, it would seem probable that the judgment against A. in the case supposed would be invalidated, and that A. might be compelled to refund what he had received.

If the action be an action of debt, the *queritur* states the amount claimed, but not so if the action be for damages; and in the action of debt, if there be several *counts*, the *queritur* ought regularly to demand the *aggregate of them all*. If, however, it demand more or less than such aggregate, it is not so material as to be a ground of objection. (2 Chit. Pl. 384, n (O); 1 Saund. 288 e, n (1); 4 Rob. Pr. 97; *Lord v. Houstoun*, 11 East. 62; 1 Chit. Pl. 393.)

In general, the declaration should be in the *debet* and *detinet*; that is, it should aver in the latter part of the *queritur* clause, that the debt demanded is one which the defendant "to the said plaintiff *owes*, and from him unjustly *detains*;" but upon the principle that one may waive a part of his grievance, the plaintiff may abridge his demand, and declare in the *detinet* only, instead of the *debet* and *detinet*. And in a few cases it is proper so to declare. Thus, in actions by and against an executor or administrator, in his representative capacity, the declaration should in general be in the *detinet* only, because in such cases, the money is not *owing to or by* the personal representative, although it is *detained from or by* him. And hence, if the demand be one which is in fact *owing to or by* him, as in case of an action against an executor or administrator suggesting a *devastavit*, or wasting of the decedent's assets in his hands to be administered, the *debet* and *detinet* is proper; as it is also for rent accruing in his own time, for the occupation of premises leased to his decedent, whereof he takes possession; and upon any contract made with him, although he be named executor or administrator therein. (1 Chit. Pl. 393; Com. Dig. Pleader, (2 W. 8); 4 Rob. Pr. 101 & seq; *Wilson v. Hobday*, 4 M. & S. 125; *Waller v. Ellis*, 2 Munf. 88; *Spotswood v. Price*, 3 H. & M. 123; *Bayley v. Beckwith*, 7 Leigh, 604.)

3^d. The Statement of the Cause of Action, with Particulars.

The declaration must allege all the circumstances which are necessary to support the action, and must contain a full and clear statement of the injury complained

of, embracing details of time, place, and circumstances, with such precision, certainty and clearness, that the defendant may be able to plead a direct and unequivocal plea, and the jury to give a certain and distinct verdict. (1 Chit. Pl. 285; *Bush v. Campbell*, 26 Grat. 431.)

It is important in commencing the statement of the cause of action, to guard against a dangerous phrase which exposes the pleader to fall into the flagrant error of setting forth the cause of action by *way of recital*, instead of in terms positive and direct. The phrase referred to is *quod cum* or *whereas*, and is frequently met with in English precedents. Where the stating part of a declaration begins with "*for that whereas*," there is always danger that the style of recital thus commenced, will be continued to the end; and although, from the fact that in actions *ex delicto*, the declaration not seldom consists of a single sentence, the danger of beginning the statement with a *quod cum*, is appreciably greater than in actions founded on contract; yet, in these latter actions too, the pleader sometimes falls into the error, (*Sexton v. Holmes*, 3 Munf. 566; *Syme v. Griffin*, 4 H. & M. 280,) whilst more numerous cases occur of a similar mistake in actions for tort. (*Ballard v. Seavell*, 5 Call. 533; *Hord v. Dishman*, 2 H. & M. 601; *Moore v. Dawney*, 3 H. & M. 134; *Cooke v. Simms*, 2 Call. 48; *Lomax v. Hord*, 3 H. & M. 276; *Donaghue v. Rankin*, 4 Munf. 261.) It is prudent, therefore, to avoid the obnoxious form "*for that whereas*" in all cases, and to substitute for it the phrase "*for this, to wit*."

The *certainty* required in forensic statements is what is designated by pleaders as "*certainty to a certain intent in general*," which quaint phrase indicates what upon a fair and reasonable construction may be called *certain*, without recurring to *possible facts* which do not appear, and without repelling every conceivable contrary hypothesis. Thus it is not requisite to aver that a defendant who is alleged to have made a promise, was free from all disabilities of infancy, coverture, &c.; but it suffices to state that he made the contract, leaving it to him to aver any circumstances which may invalidate it. (1 Chit. Pl. 268; 3 Th. Co. Lit. 361, & n (B).)

In order to avoid excessive prolixity, the declaration in assumpsit to recover on long accounts for merchandize, or for work and labor, avers in general terms, that defendant is indebted for divers goods, wares, and merchandize, &c., or for work and labor, without going into particulars, (St. Pl. 300), and with us the needful cer-

tainty is attained in assumpsit, by requiring the plaintiff to file with his declaration an account stating distinctly the several items of his claim, unless it be plainly described in the declaration. (V. C. 1873, c. 167, § 13; *Minor v. Minor*, 8 Grat. 3; *Fitch v. Leitch*, 11 Leigh, 473 & seq; *Moore v. Mauro*, 4 Rand. 488; *Robinson v. Burks*, 12 Leigh, 378.)

The parties, as we have seen under the preceding head of the *queritur*, must be adequately described; but when they are once properly designated, it is sufficient and best to refer to them afterwards, as "*the said plaintiff*," or "*plaintiffs*," and "*the said defendant*," or "*defendants*." (1 Chit. Pl. 279-'80.) Where the action is founded on an instrument of writing, signed by the defendant, but by a name other than his proper and ordinary designation, he ought to be sued *by his true name*; and the declaration, in describing the writing, should contain an averment to explain and reconcile the apparent discrepancy, as that he was known at the time of executing the instrument *by the name affixed thereto, as well as by his true name*, which he is estopped, by having used that name, to deny. Thus, in case of a suit on a *bond* purporting to be signed by *W. B. & Co.*, the signature having been affixed *with the seal*, by *W. B.* in the absence of his partner, *J. S.*, and without authority *under seal* from him, the action should be against *W. B.* alone, (*J. S.* not being in general bound by the writing); and in describing the bond, it should be stated to have been made by *W. B.*, "*by the name of W. B. & Co., by which name, as well as by the name of W. B., the said defendant is called and known.*" (*Williams v. Bryant*, 5 M. & Wels. 454, and cases cited in notes there; 1 Greenl. Ev. § 69, & n (3); 4 Rob. Pr. 103 to 105.) To complain, as is often done, "*of W. B., otherwise, called W. B. & Co.*," as having executed the instrument, without otherwise explaining the discrepancy, is at all events awkward, and *is said* to be an error fatal on demurrer, (because a party cannot in law have two distinct names of baptism), and not less fatal upon the plea of *non est factum*, on the ground of variance. (*Williams v. Bryant*, 5 M. & Wels. 454-'5; *Gould v. Barnes*, 3 Taunt. 504; *Evans v. King*, Willes. 554.)

To mistake the name of *either party*, plaintiff or defendant, was at common law, ground for a plea *in abatement* for the *misnomer*; but in Virginia, (in wholesome imitation of Stat. 3 & 4 Wm. IV, c. 42, § 11; (St. Pl. (ed. 1845) 302), no such plea is allowed, but the decla-

ration on defendant's motion, and on affidavit of the right name, may be amended by inserting the right name. (V. C. 1873, c. 167, § 18.)

A mistake in the name of *third persons*, not parties, may be more serious. It may amount to a *variance*, which will oblige the pleader to ask leave to amend his declaration or other pleading, thereby perhaps leading to a postponement or *continuance* of the cause until the next term. (V. C. 1873, c. 173, § 7.) The *mis-spelling* of a name, however, is not material if the two names be of the *same sound*. This is familiarly known as the doctrine of the *idem sonans*. Thus it is no variance to write *Segrave* for *Seagrave*, *Beneditto* for *Beniditto*, *Whyneard* for *Winyard*, *McNicol* for *McNicole*. But *McCann* for *McCarn*, *Shakspeare* for *Shakepeare*, *Tabart* for *Tarbart*, and *Shutliff* for *Shirtliff*, having not the same sound, are fatal variances; that is, unless the pleading be amended by leave of court. (Archb. Crim. Pl. &c. 38.) To reverse the order of the Christian names, as to write "*William Charles*" for "*Charles William*," is a *misnomer*, and a variance fatal until, as in other cases of variance, it is corrected. (1 Chit Pl. 279.)

The common law requires the *place where, and the time when*, every material and traversable fact which is alleged occurred, to be accurately and truly stated. This requirement grows out of the old doctrine, that the jurors are called *not to try from the evidence* laid before them, but to *recognize from their own personal knowledge as witnesses*, the truth in respect to the issue made up between the parties. Whilst the jurors were thus *recognitors* as to the truth of the averments contained in the pleadings, it was, of course, necessary that allegations of a material fact upon which the issue might be joined, should be stated *with a place*, in order to acquaint the sheriff with the hamlet, *visne*, (*vicinetum*), or neighborhood whence to summon the jurors; and *with a time*, in order that the officer might discover which of the inhabitants had knowledge of the matter. And although this state of things has long since passed away, near three centuries having elapsed since the jurors ceased to be *recognitors*, and have become *triers* of the facts alleged upon the evidence adduced, yet the common law still persists in its original requirement, that every traversable fact shall be stated with a *place and a time*, in order, it is sometimes said, to promote *certainty* or precision of statement; but in fact the *certainty*, if that be the object, is not attained, for it is not needful to prove the time or place as alleged (supposing them to be stated under a

videlicet) unless they are material to the real merits, as they may sometimes be *in substance*, and as they always are when they are *descriptive of a material fact*, as in the case of the *date of a writing*, &c. (1 Chit. Pl. 287, 290, 296.) It was, therefore, a very judicious amendment to the common law to provide, as is done by statute in Virginia, that it shall not be necessary in any declaration or other pleading to set forth *the place* in which any contract was made or act done, unless when, from the nature of the case, the place is *material or traversable*; and more generally, that all allegations which are *not traversable*, and which the party *could not be required to prove* (as for the most part is true in respect to *allegations of time*), *may be omitted* unless where they are required for the right understanding of allegations *that are material*. (V. C. 1873, c. 167, § 8, 10.) And in pursuance of the same policy of discarding objections merely formal, it is provided that it shall not be necessary in any action to aver that the cause of action arose, or that the matter is within the jurisdiction of the court (V. C. 1873, c. 167, § 9.) Apart from this statute, enacted at the revision of 1849, it was necessary in all actions in courts of limited jurisdiction, (as the corporation courts formerly were in Virginia; but not the county or circuit courts), to aver that the cause of action arose, or the matter was within the jurisdiction of the court. (Hill v. Price, 4 Call. 107; Thornton v. Smith, 1 Wash. 81; Winder v. Eddy, 1 Wash. 87 & note; Turberville v. Long, 3 H & M. 313; 3 Rob. Pr. (2nd ed.) 506-'7.)

For the averments which are proper or necessary respectively, in the several actions, reference must be had to the books of practice, and especially to Chitty's Pleading and Robinson's Practice, (2nd ed.) A very brief exposition of their general character is all that is now admissible, and that only with reference to those actions most frequently in use;

W. C.

1^h. Trespass on the Case in *Assumpsit*.

See 1 Chit. Pl. 316 & seq; 4 Rob. Pr. 214-'15.

The statement of the cause of action in *assumpsit* is either *general*, where certain very comprehensive *formulae*, founded upon an alleged *indebtedness* from defendant to plaintiff, for *goods sold, work done, money lent*, &c., are applicable; or *special*, where the cause of action must be set out in terms more precisely adapted to the special circumstances of the case, being employed in all other instances of a promise *not under seal*, except the single one stated above, of *indebtedness* for

goods sold, work done, money lent, &c. ; as for example, for *not accepting* goods bought ; for *not doing work* according to agreement, &c. ; on promissory notes, or bills of exchange, for all which, as well as for any other like cases, the cause of complaint must be set out in language corresponding to the facts. These two classes of forms are known respectively as *general* and as *special* counts ; and not unfrequently it is desirable to employ both in the same declaration ; either because there are two or more distinct *real causes* of action of a character *general* and *special*, severally ; or still more frequently, in order to meet *varying phases of proof*. Thus in an action for refusing to accept goods bought, it might be very well anticipated that the proof at the trial would possibly disclose that the goods *had been accepted*, and in order to fit that possible state of the evidence it is often prudent to insert in the declaration a count alleging the defendant's *indebtedness* for goods *actually sold and delivered*. So in an action on a promissory note, or a bill of exchange, there might be some difficulty at the trial in proving the *execution* of the note or bill, whilst it would be easy to establish the sale of the goods, or the loan of the money, &c., on which the written security was founded ; and it would therefore be frequently expedient to have in the declaration, besides the *special count* on the written security, a *general one* for work done, goods sold, &c., so that if the plaintiff should fail at the trial to make out his special cause of action on the bill or note, he might yet recover upon the general indebtedness arising from the doing of the work or the sale of the goods, &c. Again, in an action of a special contract for certain work, where the work has been *completed and accepted*, prudence usually requires that the practitioner should not content himself with only a *special count*, founded on the contract as made, but that he should also insert a *general count* for the price of work done. Then if the plaintiff fail to prove the contract *as he alleged it*, or to show that the work was done *as the contract required*, he may notwithstanding recover upon the *general count* the value of the work done and accepted. (1 Chit. Pl. 372, & n (2), 382 ; Carroll County v. Collier, 22 Grat. 307-'8.)

On the other hand, whilst when the claim is merely pecuniary, and is founded on a consideration past or executed, it is *sufficient* to declare upon the *general*, or as they are often styled, the *common counts*, yet there are many occasions in which, although it may not be

strictly necessary, yet it is judicious to insert a *special count* in the declaration. For example, upon a written contract to build a house, if the work has been done and the price is payable in *money*, the common counts for work done and materials furnished, &c., will suffice. But if the plaintiff also declare *special* (that is, with a *special count*,) setting out the written contract, and the defendant suffer judgment to be entered against him *by default*, the contract as *stated in the declaration* is admitted, and no objection can be raised at the trial on the ground of insufficient execution of the work. In other instances, as for example, in actions against agents for not accounting for goods entrusted to them, (or their proceeds,) or for not using due care in selling, &c., the declaring *special* (being for unliquidated damages,) will exclude a plea of *tender* or of *set-off*, (neither of which defences are available save where the plaintiff's demand is *in the nature of a debt*,) but it does not exclude a plea of *bankruptcy*. (1 Chit. Pl. 316-'17; James' Bankrupt Law, 79.)

As to the structure of *special counts*, reference ought always to be had in preparing them, to an accredited book of *forms of pleading*, and none can be recommended with more confidence than the work on pleading of Mr. Chitty. (See 2 Chit. Pl. 115 & seq.) But it is worth while to observe, in general, that besides the averment of the *breach of contract*, and the *conclusion*, stating the *damages*, &c., which constitute parts of the declaration distinct from the *statement of the cause of action*, with which we are now engaged, a *special count* in *assumpsit* embraces in such statement four points or parts which are to be principally considered, namely: (1), The *inducement*; (2), The *consideration*; (3), The *contract itself*; and (4), The necessary *averments* of plaintiff's *performance* on his part. (1 Chit. Pl. 317.)

The *inducement*, in an action of *assumpsit*, is in the nature of a *preamble*, stating the circumstances under which the contract was made, or to which the consideration has reference. It does not seem to be absolutely necessary in any case to be *formally set forth*, but it is useful for the purpose of perspicuous statement, which is as much a *desideratum* in pleadings as in any other class of allegations. As the office of the inducement is explanatory, it does not in *general* require exact certainty; but for some purposes, as for instance, in matters of *description*, it must conform to the fact. (1 Chit. Pl. 318 & seq.)

The *consideration* of an alleged promise must for the most part be stated, (and *stated truly*,) where the contract is *not under seal*, or is not of the class of *mercantile securities*, (bills of exchange, or promissory notes made negotiable by statute,) in either of which cases a valuable consideration *is presumed*, and need not, therefore, be averred; and the consideration stated must appear to be *legally sufficient* to support the promise for the breach of which the action is brought. (1 Chit. Pl. 321 & seq.) And in Virginia by statute, the same principle is applied to an action of *debt*, (but not of *assumpsit*) on *any note in writing* for the payment of money, signed by the party to be charged, or his agent; that is, in such case it is not necessary to *aver or prove* a valuable consideration, but it is *prima facie* presumed, although liable to be disproved by the defendant. (V. C. 1873, c. 141, § 10; *Peasley v. Boatwright*, 2 Leigh, 198.)

The statement of the *contract itself* is of course a necessary element in every declaration in *assumpsit*. The promise may turn out in evidence at the trial to be either *express or implied*; but the same identical terms of description are employed, (supposing the agreement to be *not in writing*,) whether it be the one or the other. The usual form of averment is that the defendant “undertook and faithfully promised;” but other equivalent words will suffice, taking care, however, that a *promise itself* shall be averred, and not merely *evidence of a promise*. The contract must be stated *with certainty*, that is, with “certainty to a common intent in general;” and also with *directness*, and not by *way of recital*. The names of the parties to it must be specified; if the contract be *in writing*, that fact need not be, although it is generally set out; so much only needs to be stated as the plaintiff complains *has been broken*; it must be stated according to its *legal effect*, and not according to the *form of words*; and any proviso or exception contained in the contract, as part thereof, must be specially set forth. A misdescription of the contract, in any *material* particular, will in general be fatal at the trial, *as a variance*; that is, it will oblige the plaintiff to *amend his declaration*, (whereby judgment will be usually delayed for at least one term. But see V. C. 1873, c. 173, § 7); for it is an universal requirement that the *allegata* and the *probata* shall substantially correspond. As to what constitutes a *variance* thus fatal at the trial, some general account will be given hereafter, (*post*, p. , &c.) but for details,

reference must be had to the books of Practice, and the works on Evidence. (1 Chit. Pl. 329 & seq; 1 Greenl. Evid. § 63 & seq; 2 Do. § 11 & seq; 160, 189, 625; V. C. 1873, c. 173, § 7; 1 Rob. Pr. (1st ed.) 233; 5 Rob. Pr. 241-'2, 254; Perkins v. Hawkins, 9 Grat. 653.)

An *averment*, it may be well to remark, signifies a *positive statement of facts*, in opposition to argument or inference; and when the defendant's obligation to perform his contract depends on an event which would not otherwise appear from the declaration to have occurred, it is obvious that an *averment* of such event is essential to a logical statement of the cause of action, and ought to precede the statement of the defendant's breach of his promise; as for example, (1), Of the *performance*, or *excuse* for non-performance of a *condition precedent*, or of the happening of any event material to the cause of action; (2), That defendant *had notice* of such performance, or of such event; and (3), That he *was requested* to perform his contract. (1 Chit. Pl. 351 & seq; Carroll County v. Collier, 22 Grat. 307-'8; 5 Rob. Pr. 254-'5.)

Common counts in assumpsit are founded on promises, express or implied, *to pay money*, in consideration of a preceding or existing debt. In general, the consideration must be *executed*, and *not executory*, and the plaintiff, in return for such consideration, must be entitled to *money*, and not to *goods*, or to a bill of exchange, or negotiable note, &c. (1 Chit. Pl. 373-'4.)

Originally, there were *seven* descriptions of common counts in assumpsit, namely, (1), The count of *indebitatus assumpsit*, for goods sold, work done, &c.; (2), The count of *quantum meruit*; (3), The count of *quantum valebant*; (4), The count of *indebitatus assumpsit*, for money *paid, laid out, and expended*; (5), The count of *indebitatus assumpsit*, for money *lent and advanced*; (6), The count of *indebitatus assumpsit*, for money *had and received by defendant* to plaintiff's use; and (7), The count of *account stated*. It will be profitable to observe discriminatingly their application and use respectively:

(1), The count of *indebitatus assumpsit*, for the *price of goods sold, work done, &c.*

This count alleges, that defendant *was indebted* to plaintiff in a named sum of money, for *goods sold, work done, or both*, or for some other specific subject; and *being so indebted*, in consideration thereof, he *promised to pay the said sum*.

(2), The count of *quantum meruit*.

This count alleges, that defendant promised to pay the plaintiff for *certain work done*, such sum as the plaintiff *reasonably deserved to have* therefor, and that he reasonably deserved to have therefor *a sum named*, of which defendant had notice.

The employment of the *quantum meruit* count grew out of the fallacious impression, that where the count of *indebitatus assumpsit* was used alone, it was requisite to prove the *precise amount* of indebtedness, as alleged; a necessity obviated, the old pleaders supposed, by this count of *quantum meruit* in the case of *work done*, and the count of *quantum valebant* in the case of *goods sold*; which averred that defendant promised to pay, in the case of the *work*, as much as the plaintiff *reasonably deserved to have* for the same, and in the case of the *goods* as much as *they were reasonably worth*;

(3), The count of *quantum valebant*.

This count alleges, that defendant promised to pay the plaintiff for *certain goods sold and delivered* by him to defendant as much as *they were reasonably worth*; and that they were reasonably worth a sum named, of which defendant had notice.

The use of the count was suggested, as we have seen, by the same fallacious considerations as led to the introduction of the *quantum meruit*.

(4), The count of *indebitatus assumpsit, for money paid, laid out and expended*.

This count is in principle and substance exactly like the *first*, differing from it only in the *subject* of the alleged indebtedness, which in the first was *work done, and goods sold, &c.*, and in this is *money paid, laid out and expended*.

(5), The count of *indebitatus assumpsit, for money lent and advanced*.

This count resembles the *first* and *fourth*, save only in the *subject of indebtedness*, which is *money lent and advanced* by plaintiff to defendant, instead of *goods sold, &c.*

(6), The count of *indebitatus assumpsit, for money had and received* by defendant to plaintiff's use.

This count resembles the first, fourth and fifth, save only in the *subject of indebtedness*, which is *money had and received, &c.*

(7), The count of *account stated*.

This count avers, that the defendant accounted with the plaintiff of and concerning divers sums of money

before that time due to the plaintiff from defendant, and that *upon such accounting*, defendant was found indebted to the plaintiff in a *sum named*, which, in consideration thereof, he promised to pay, &c.

In process of time it was observed, that there was no need of the *quantum meruit* and *quantum valebant* counts; the assumption on which they were founded, namely, that it was requisite to prove in an *indebitatus assumpsit* count, the precise sum demanded, being ascertained to be a *mistaken one*. (1 Chit. Pl. 376; 2 Saund. 122, n (2).)

It was then perceived, that as the three *money counts* (4), (5), and (6) above) were *indebitatus counts*, differing from the first only in the *subject of indebtedness*, the first being for *goods sold, work done, &c.*, whilst these are for *money lent, paid, &c.*, these latter might be inserted in, and along with the subject of indebtedness in that count, and of course might as separate counts be in general discontinued.

It follows from what has been said, that the number of *common counts* at present employed in assumpsit is *but two*, namely, (1), *Indebitatus assumpsit*, for whatever is the subject of indebtedness, goods sold, work done, money lent, &c.; and (2), *The account stated*.

(1), Count of *indebitatus assumpsit*.

This count alleges defendant to be indebted to the plaintiff in a named sum, for any subject or subjects of indebtedness, as for *goods sold, work done, lands sold or rented, money lent, &c., money paid, &c., money had and received, &c.*, or for as many of those or other subjects as the facts warrant.

(2), Count of *account stated*.

This count contains the same averment as before. (1 Chit. Pl. 373 & seq.) It is sometimes particularly useful in saving the necessity of filing with the declaration a *bill of particulars*, showing distinctly the several items of the demand, which is required in connection with the *indebitatus count* in assumpsit, unless it be plainly described in the declaration. (V. C. 1873, c. 167, § 13.) Such a bill of particulars is not necessary in connection with a count of *account stated*, because the declaration itself in that count sets forth the ground of the claim, namely, the *settlement* which has taken place, and the *promise to pay the balance* found to be due. (Fitch v. Leitch, 11 Leigh, 471.)

2^d. *Action of Debt.*

In framing the declaration in an action of debt, the general requisites and qualities of a declaration, which

have already been pointed out, (*Ante*, p. 568 to 575,) must be observed. We are now to consider only the mode of *stating the cause of action*, which varies according to the nature of the contract or matter declared on, that is, according as the subject of the action is a simple contract, a specialty, a record, a statute, or a tort.

(1). On a *Simple Contract*.

In debt on a simple contract, express or implied, to *pay money*, in consideration of a precedent debt or duty, the *subject-matter* of the debt is to be described as in the common counts in assumpsit, (*Ante*, p. 580 & seq); but in point of form the *indebitatus* and *quantum meruit*, or *valebant* counts, differ from those in assumpsit in that no *promise* is averred, as it is in the latter. It is simply alleged that, by reason of the promises, an action hath accrued to the plaintiff to demand the sum in question. Thus the *indebitatus* count states that the defendant on, &c., at, &c., "was indebted to the plaintiff," in a named sum of money, "for goods sold," &c., just as an assumpsit, and with no more precision than in that action, "to be paid to the said plaintiff when the said defendant should be thereunto afterwards requested; whereby, and by reason of the said last-mentioned sum of money being and remaining wholly unpaid, an action hath accrued to the said plaintiff, to demand and have of and from the said defendant, the said sum of — dollars." And so the *quantum meruit* and *quantum valebant* counts (which, however, may, and ought to be, omitted), resemble those in assumpsit, except that the words "*agreed to pay*," ought to be substituted for "*promised to pay*," and except also that they shall in general conclude with the same allegation, "whereby, &c., an action hath accrued," &c., as the *indebitatus* count. (1 Chit. Pl. 394; 2 Do. 385.)

On a simple contract to pay *money*, whether by word of mouth or in writing, an action of debt lies; and when specially declared on, that is, where, omitting the common counts of *indebitatus*, &c., the plaintiff sets forth the promise to pay as the ground of his action, a consideration must be stated; and whilst in general the declaration in this case is framed like one in assumpsit, yet it is with this exception, that it must be alleged that the defendant *agreed*, not that he *promised* to pay, &c. (1 Chit. Pl. 394-'5, 323 & seq.)

It is worth while to observe, that at common law an action of debt lies not on a promissory note itself, but only upon the contract, of which the note is the evidence, averring and proving the consideration, as above

stated. (Clerke v. Martin, 2 Ld. Raym. 757; Burton v. Souther, Id. 774; Williams v. Cutting, Id. 825; Story v. Atkins, Id. 1430; Brown v. Harraden, 4 T. R. 151; Peasley v. Boatwright, 2 Leigh, 198.) This doctrine was altered in England, as to the promissory notes embraced by the Stat. 3 & 4 Anne, c. 9, which made notes for *sums certain*, payable to *order or bearer*, negotiable like bills of exchange, but not as to other notes than these. But in Virginia, by statute, it is enacted that an action of debt may be maintained upon *any note or writing* by which there is a promise, undertaking or obligation to pay money, if the same be signed by the party who is to be charged thereby, or his agent, (V. C. 1873, c. 141, § 10.) And the courts hold this statute to allow the action of debt to be maintained *upon the note*, without averring or proving any consideration, although the defendant may disprove it; for if it were still needful to aver and prove a consideration in such action on the note itself, the statute just cited would operate nothing. (Peasley v. Boatwright, 2 Leigh, 199.)

(2), *On a specialty, or writing under seal.*

In an action of debt on a *specialty*, (that is, a writing under seal,) no inducement, and no statement of the consideration upon which the contract was founded is usually necessary; for neither the want nor the failure of consideration will at common law invalidate a specialty; and in this particular it is that a declaration in debt, or covenant on a specialty, most markedly differs from a declaration in assumpsit. Thus, in debt upon a bond, the declaration, when it comes to set forth the cause of action, states "that the defendant, on &c., at &c., by his certain writing obligatory, sealed with his seal, and to the court now here shown, acknowledged himself to be held and firmly bound to the plaintiff in the sum," &c., and then states the breach in the non-payment of the sum demanded. (Com. Dig. Pleader, (2 W. 9); 1 Chit. Pl. 395.)

When an inducement is needful to be stated, it may be set forth as in assumpsit, *Ante*, p. 577; 1 Chit. Pl. 395 & seq. 317 & seq.)

At common law every pleading which avers and relies upon a specialty should make *profert* of it to the court, of which the *formula* is "and now to the court here shown," or "now brings here into court;" or if it be impracticable so to exhibit it because it is lost or destroyed, or is in the custody of the adverse party, the *profert* should be excused according to the fact, by

averring that the deed "has been lost," or "destroyed," "by accident," or that it is "in the possession of the adversary party," &c., and that, "therefore, the said _____ cannot produce the same to the court."

Hence, in an action of debt on a bond, or of covenant on any writing under seal, *profert* must, at common law, be either made or excused. But in declaring upon any simple contract, such as a promissory note, bill of exchange, &c., no *profert* or excuse is required. (1 Chit. Pl. 398-'9.) *Profert* is with us dispensed with, and may be omitted in all cases, although it is not error still to insert it. (V. C. 1873, c. 167, § 9.)

Every contract should properly be stated, according to its *legal operation and effect*, although it seems to be not error to set it forth in *hæc verba*, and in some cases, this latter course may be preferable. (1 Chit. Pl. 400, 335 & seq.) And when the obligation is in the *alternative*, or is *conditional*, or is subject to *exceptions*, *provisos*, or *qualifications*, care must be used to set it forth accordingly, or else there will be a variance between the writing as described and as exhibited, which will exclude it from being offered in evidence at the trial; or if the writing be under seal, and oyer if it be demanded, the variance may be taken advantage of *on demurrer*. (1 Chit. Pl. 400, 401, 338 & seq; Davis v. Mead, 13 Grat. 121 & seq.)

In an action on a bond with collateral condition, there are in England, under the statute 8 & 9 William III, c. 11, and under our corresponding statute, (V. C. 1873, c. 173, § 17), two ways of declaring, namely: (1), Simply to state the obligation as a common bond, without setting forth the condition; and if the defendant takes *oyer* of the bond and condition, and pleads that he has performed the conditions, the plaintiff must then, by replication, allege as many breaches thereof as he thinks fit; or if there be no appearance by defendant, and a writ of inquiry is awarded, the plaintiff must, in that case, assign the breaches by a suggestion of them in writing, (3 Rob. Pr. (2nd ed.) 586 & seq; Green v. Bailey, 5 Munf. 246; Allison v. The Bank, 6 Rand. 226; Sangster v. Com'th, 17 Grat. 135 to 137; Gainsford v. Griffith, 1 Saund. 58 b. n (1); Governor v. Roach, 9 Grat. 13); and (2), To set out the breaches of condition in the declaration itself. And this latter method is preferable; for where the plaintiff declares simply on the obligation, as though it were a common money bond, there is nothing in the *declaration* to inform the clerk that a writ of inquiry should be awarded;

and unless the bond were filed with the declaration, which, though usual, is not necessary, such writ would probably not be awarded. And yet, if final judgment were rendered in such case without awarding and executing a writ of inquiry, it would be clearly erroneous, (3 Rob. Pr. (2nd ed.) 588; *Allison v. The Bank*, 6 Rand. 227; *Ward v. Fairfax Justices*, 4 Munf. 494; *Nadenbousch v. Lane*, 4 Rand. 413; *Gainsford v. Griffith*, 1 Saund. 58 b. n (1).)

The mode of assigning breaches, and the degree of particularity required, may be seen from 3 Rob. Pr. (2nd ed.) 589 & seq; *Governor v. Roach*, 9 Grat. 13; *Sangster v. Com'th*, 17 Grat. 135 to 137.

In many cases it is necessary to introduce in the declaration an averment of performance by the plaintiff of a condition precedent, or other matter, or to show a legal excuse for the omission to perform the act; and in some instances it must be alleged that the defendant had notice of the plaintiff's completion of the matter he was bound to perform, and was requested to fulfil his, the defendant's, covenant. These several averments have been already alluded to, *Ante*, p. 579, and for a fuller discussion of them reference must be made to the authorities there cited, and to 1 Chit. Pl. 401; 3 Rob. Pr. (2nd ed.) 571 & seq.)

(3), On *Records*.

The action of debt is a proper remedy on all contracts of record, such as recognizances and judgments. In an action upon a *recognizance*, the undertaking must be stated in the declaration with certainty, following the description in the entry of the recognizance, and setting forth in what court, or in what manner, at whose suit, and for what term or cause the recognizance was entered into. It vouches the record, which contains the recognizance, and shows how, according to its terms, the defendant became liable in pursuance of it. (1 Chit. Pl. 403; 2 Do. 472 & seq.)

In an action upon a *judgment*, the declaration must set forth the parties, the sum recovered, the court, and it is said the term; but it is not needful to state the cause of action, or that the defendant became indebted within the jurisdiction of the court. Care must be taken that there shall be no *variance* in the statement of these particulars, for that would be fatal, until the declaration is amended. (1 Chit. Pl. 403-'4; 2 Do. 482 & seq; 4 Rob. Pr. 111 & seq.)

(4), On *Statutes*.

In debt on a statute at the suit of a party aggrieved,

or by an informer when the *whole* penalty by the statute accrues to him, the commencement is the same as in debt on a contract; but when a part of the penalty only is given to the informer, and the commonwealth or the overseers of the poor are entitled to the residue, the commencement and the other parts of the declaration usually states that the plaintiff sues *tam pro republica quam pro seipso*. The date of the statute, supposing it to be a public one, need not, and had better not, be stated; but the offence or act charged must appear to be within the provisions of the statute, and all the circumstances necessary to support the action must be stated. Moreover, where the act or omission on which the suit is founded, is not an offence at common law, it is necessary in all cases to conclude "against the form of the statute" or "statutes." (1 Chit Pl. 404 & seq; Com. Dig. Pleader, (C. 76); Id. Action upon Statute, (E. 1); 3 Rob. Pr. (2nd ed.) 612 & seq.)

3^d. Action of Detinue.

The action of detinue, as we have seen, (*Ante*, p. 447,) is for the recovery of some specific chattel, if to be had, and if not, for its value in the alternative, and in either case, damages for its detention; as in the case of a horse, a bill, note, deed, or other document, a sack or box of money, or other valuables, or in short, for any personal chattel whatever which is susceptible of identification and restitution. (3 Rob. Pr. (2nd ed.) 468 & seq; Austin v. Jones, Gilm. 348, 350; Myers & Son v. Friend, 1 Rank. 12; Archer v. Williams, 2 Car. & Kir. (61 E. C. L.) 26.)

The gist of the action is the detainer by the defendant of the plaintiff's property. Whilst, therefore, the declaration must aver a general or special property in the chattel to be in the plaintiff at the time of the bringing of the action, and a possession in the defendant then, or at an anterior time, it need not state the plaintiff's title further than to say that the chattel was "of the goods of the said plaintiff," or that "he was lawfully possessed of it as of his own property;" nor is it necessary to set forth the way in which the defendant acquired the possession, whether by finding, by delivery to him to keep for a time, or otherwise. (3 Rob. Pr. (2nd ed.) 468 & seq; 1 Chit. Pl. 413.)

It is a general rule, that in actions for injuring or taking away goods or chattels, it is for the most part necessary to state their *quality*, *quantity*, or *number*, and *value* or *price*, because otherwise the defendant could not properly defend himself, nor could a former

recovery be pleaded in bar of a second action for the same wrong; and in detinue this rule is applied with more particularity than in trover, trespass, or case, because in the former action the plaintiff claims to recover the *goods themselves*. And in respect of the *quality* of the chattel, as that is matter of *description*, the averment must be sustained by the proof. In respect of *quantity* or *number*, or of *value*, the plaintiff may prove *less* than he charges, but he cannot prove *more*, so that he must take care to have the quantity, number, or value clearly adequate to recover the largest possible amount. (1 Chit. Pl. 410-'11.)

4^h. Action of Covenant.

As the action of covenant can only be supported on a *deed*, there is less variety in the declarations in this action than in debt, and, therefore, but few observations will here be necessary, especially as most of the rules to be observed in framing a declaration in assumpsit or debt equally apply to covenant.

The doctrine touching the statement of the *inducement* or introductory matter to the material averments; the mode of setting out the deed; the *profert* of it; the *averments* of conditions and their performance, of notice, &c., and the statement of the breach or breaches of the covenant, are essentially the same in this action as in assumpsit and debt. It is usual, after stating the breaches of the covenant declared upon, to conclude by alleging: "And so the said plaintiff says, that the said defendant, (although often requested so to do,) hath not kept his said covenant, but hath broken the same," &c.; but this is a merely formal allegation, and may be omitted. (1 Chit. Pl. 408-'9; 3 Rob. Pr. 362 & seq, 582 & seq.)

5^h. Actions in form *ex delicto*, generally.

The actions in form *ex delicto*, here to be adverted to, wherein declarations are to be filed, are trespass *vi et armis*; ejectment, which in its origin was trespass *vi et armis*, and in its modern adaptations is a *mixed action*, designed to recover land, and damages for its detention; and trespass on the case in trover and conversion, in slander, in libel, and for wrongs generally, arising *not directly* from force applied by the wrong-doer.

In this class of actions the declaration should state, (1), The *matter or thing* affected; (2), The plaintiff's *right* thereto; (3), The *injury*; and (4), The *damage* sustained by the plaintiff; but the particulars under each of these heads are too numerous to be here set

forth. (See 1 Chit. Pl. 409 & seq; 3 Rob. Pr. 419 & seq, 406 & seq, 441 & seq, 873 & seq.)

4^e. The Breach.

The breach is applicable, of course, only in actions *ex contractu*. It need hardly be said that it means the *breach of the contract* alleged in the statement of the cause of action. Where the contract thus alleged is a special and detailed one, the breach must also be special and detailed. Where the contract is set forth in general terms, the breach may be stated in like manner generally. (1 Chit. Pl. 365, &c. 407, 409; Rob. Pr. (2nd ed.) 582 & seq; 4 Do. 107 & seq, 240 & seq.)

Where the action is *ex delicto*, as no contract is averred therein, there can be, of course, no breach, and, therefore, this part of the declaration is, in such actions, wholly wanting.

5^e. Conclusion and Production of Suit.

The declaration always concludes with an averment of the damages sustained by the plaintiff, by reason of the injuries alleged in the declaration, and avers that the plaintiff thereupon *brings or produces his suit*. (1 Chit. Pl. 452-'3.)

Originally, no plaintiff was permitted to state his complaint to the court unless he could produce responsible persons to vouch for him, that his character was such as to render it probable that his complaint was well founded, or at least not frivolous or vexatious. (3 Bl. Com. 295; St. Pl. 429.)

These persons were denominated the plaintiff's *secta*, or *following*, or *suite*. Hence, the prothonotary always concluded his brief note of the plaintiff's complaint by mentioning that he was attended by this needful *secta*, which was done by the phrase still retained in the declaration, "*inde producit sectam*." The phrase, therefore, does not mean, as ignorant people suppose, "*therefore he brings his action*," (which such people paraphrase by, "*and therefore he sues*"); but it only means a reference to this antiquated and long obsolete notion, "*and therefore, or thereupon, he produces his secta, following, or suite*."

In respect to the *statement of damages*, the amount in the action of debt is immaterial, except in actions of debt on bonds *with collateral condition*, and on bonds *in a penalty* for the payment of money, where the principal and interest together exceed the penalty; in which case excess over the penalty can be recovered *only as damages*. In all other actions than the action of debt, the damages are material, for *sounding*, as all other actions

do, in damages, no more can be recovered than is stated.

- Immediately after the conclusion of the declaration, by the production of suit, an executor or administrator was required, at common law, to make *profert* of his letters testamentary, or letters of administration, which was done thus, in the case of an *executor*: "And the said plaintiff brings into court here the letters testamentary of the said E. F., deceased, whereby it fully appears to the said court here, that the said plaintiff is the executor of the said last will and testament of the said E. F., deceased, and hath the execution thereof, &c." And in the case of an *administrator*, thus: "And the said plaintiff brings into court here the letters of administration of the said — court, of the said — of —, which give sufficient evidence to the court here of the grant of administration to the said plaintiff, as aforesaid, the date whereof is a certain day and year therein mentioned, to wit, the day and year in that behalf above-mentioned, &c." (1 Chit. Pl. 453; 2 Do. 35, 36; Bac. Abr. Ex'ors, &c. (E.) 14.) It was a consequence of the necessity for such *profert* of letters testamentary, that whilst an executor at common law, appointed as he was *by the will*, could do before probate almost everything in the way of administration that he could do afterwards, yet could not file a declaration until he had obtained letters of probate. (Bac. Abr. Ex'ors, (E.) 14.) *Profert* of letters testamentary, and of administration, having now been abolished in England by 15 & 16 Vict. c. 76, and in Virginia by V. C. 1873, c. 167, § 9, it might be supposed that there is nothing to prevent an executor from prosecuting an action before probate, where, of course, it is uncertain whether he will ever obtain it, thus exposing the defendant to annoyance at least, and possibly to loss. In England this mischief is obviated by the exercise of the general superintending power of the court, which, on motion of the defendant, will stay proceedings in the cause on the plaintiff's part, until he takes out probate of the will, and gives notice thereof to the defendant's attorney, (*Webb v. Adkins*, 14 C. B. (78 E. C. L.) 401.) In Virginia it is still more effectually obviated, along with other mischiefs much more serious, by prohibiting an executor to exercise the powers of an executor until he qualifies as such, which supposes the probate to be accomplished. (V. C. 1873, c. 126, § 1.)
- 2'. The General Principles to be observed in *Framing the Declaration*; W. C.
- 1st. The General Principles to be Observed at *Common Law*.

No further exposition of these principles can here be made than has been already presented in describing the parts of the declaration.

See 1 Chit. Pl. 276 & seq; 3 Rob. Pr. 513 & seq.

2^d. The General Principles to be Observed *by Statute in Virginia*.

See V. C. 1873, c. 167, § 8-14.

W. C.

1^h. Statements of Place and Time.

These may be omitted, unless material to the merits. (V. C. 1873, c. 167, § 8.)

2^h. Allegations *not Traversable*, (*i. e. not deniable*), and *merely Formal*.

These may be omitted. (V. C. 1873, c. 167, § 10, 12.)

3^h. *Profert* of Sealed Instruments, and of Letters of Probate and Administration.

This may be omitted. (V. C. 1873, c. 167, § 9.)

4^h. Account of Items in *Action of Assumpsit*.

In every action of *assumpsit* the plaintiff shall file, with his declaration, an account stating plainly the items of his claim, unless it be *plainly described in the declaration*. (V. C. 1873, c. 167, § 13; Robinson v. Meems, 12 Leigh, 378; Fitch v. Leitch, 11 Leigh, 471.)

5^h. Action on a Policy of Insurance.

No particular form of declaration is required in an action on a policy of insurance, but it is sufficient to set forth the grounds of the action, and the relief prayed for, (filing the original policy or a sworn copy,) and the loss or death relied on as the ground of recovery, and that the plaintiff has performed all the conditions of the said policy, and violated none of its prohibitions. (V. C. 1873, c. 167, § 14; West. Rock Mt. Fire Ins. Co. v. Sheets, 26 Grat. 854.)

3^d. Forms of Declaration at Large, by way of Illustration.

See Steph. Pl. (ed. 1845,) 32 & seq.

It must suffice in this place to present only two instances of declarations, namely, (1), In debt on a bond; and (2), In ejectment. The exposition annexed to each, it is hoped, will enable the student, with what has been said, clearly to apprehend their structure.

(1). DECLARATION IN DEBT ON A BOND.

Title of Court. Circuit Court of A. County, to wit: (a.)
and Rules. ——— Rules ———.

Queritur. Charles Creditor complains of Daniel Debtor, being in custody,
Statement of &c., (b), of a plea that he render unto him the sum of one thousand
Cause of dollars, which to him he owes, and from him unjustly detains,
Action. (c); for this to wit, that heretofore, to wit, (d), on the first day of May, in the year of our Lord eighteen hundred and forty-

eight, at the county of A. (e), the said defendant, by his certain writing obligatory (f), sealed with his seal, and now to the court here shown (g), the date whereof is the day and year aforesaid (h), acknowledged himself to be held and firmly bound unto the said plaintiff (i), in the sum of one thousand dollars above demanded, to be paid to the said plaintiff whenever the said defendant should be thereunto afterwards requested (k). Yet the said defendant, *Breach.* although often requested (l), hath not as yet paid to the said plaintiff the said sum of one thousand dollars above demanded, nor any part thereof (m), but the same to pay hath hitherto refused, and still doth refuse, to the damage of the plaintiff one thousand dollars (n). And therefore he brings his suit (o). *Conclusion.* A. p. q.

Notes to the foregoing Declaration.

(a), In the *county court* the title would have been "*County court of A. county, to wit,*" and in a corporation court, "*Corporation [or City] court of the city of N.*"

(b), This is a mere relic of the old fiction, which, in order to enlarge the jurisdiction of the court of king's bench, pretended that the defendant was "in the custody of the marshal of the marshalsea of our lord the king." It never referred, even in England, to the defendant's being in *actual* custody, and has always been superfluous in Virginia. It would not be improper to say, "Complains of D. D., who *has been summoned* to answer the plaintiff in this action of a plea," &c.; but it is neater and more appropriate to omit altogether the words "being in custody," &c., and to say, "complains of D. D. of a plea," &c.

(c), This phrase is what is called the "*debet and detinet.*" In actions by and against administrators and executors the *debet* is not proper, because the demand cannot be said to be *owed* either by or to them. In such actions the phrase should be *detinet* only.

(d), The phrase *videlicet*, or *to wit*, is employed in introducing a specification of particulars which the rules of pleading require, when yet the pleader wishes to indicate that he does not mean to tie himself to the proof of the particulars as alleged. A specification introduced with that phrase need not be proved, unless it be descriptive of the identity of some instrument of writing, or of some other material fact; but if that phrase be omitted the particulars must be proved as stated.

(e), "*At the county of A,*" constitutes what is styled the *venue*, *vicne*, (*vicinetum*), or *neighborhood*, whence originally the jurors were summoned to *recognize* what was the truth between the parties. Hence, every traversable fact had, as we have seen, a *venue*, or place assigned where it occurred. In the course of time, jurors having

ceased to be *recognitors*, and become *triers* of all facts *upon the evidence of witnesses*, the laying the venue became for the most part a mere matter of form; yet, by the common law, it is still required, the venue being always the county *where the suit is brought*. If, therefore, *upon the face of it*, the fact appears to have occurred elsewhere than in the county where the suit is brought, a fashion was introduced of averring the fact as occurring in its true place, and then under a *videlicet* stating the venue of the action, *e. g.*, "At the city of Richmond, to wit, at the county of A." (Steph. Pl. 280 & seq; Id. (Tyler's Ed.) 278.) Our statutes dispense with any statement of place unless the place is *material or traversable*, and then the true place may be stated, without suggesting that it was at the county or corporation where the suit is brought. (V. C. 1873, c. 167, § 8.) It is also declared not to be necessary to aver that the cause of action arose, or that any matter is within the jurisdiction of the court, (V. C. 1873, c. 167, § 9), which indeed has never been considered requisite except as to courts with a jurisdiction over very limited localities. So in a similar spirit, all allegations, *not traversable*, and which the party *cannot be required to prove*, may be omitted, unless when required for the right understanding of allegation material. (V. C. 1873, c. 167, § 10.)

(f), The phrase "*writing obligatory*" imports *ex vi termini*, a *sealed instrument*. If, therefore, a promissory note were so described, the misdescription would be a fatal variance; for as the proofs must correspond with the allegations, the promissory note could not be read at the trial, and so the plaintiff would fail for want of proof. If such a mistake is committed, and is discovered before the jury is sworn, the declaration *may be amended by leave of court*, as a matter of course; and before the *defendant appears*, it may be done as a *matter of right*, without applying to the court. (V. C. 1873, c. 167, § 15.) Even after the jury is sworn the court may allow a variance not material to be amended, or may direct the jury to find the facts; and if, on consideration, the variance appear to be such as could not have prejudiced the other party, shall give judgment according to the right of case. (V. C. 1873, c. 173, § 7.) And even if the variance is material, the court, independently of the statute, may in its discretion, allow the pleadings to be amended, continuing the case, however, to another term, if the other party desires it. (1 Rob. Pr. (1st ed.) 233 & seq; Tabb v. Gregory, 4 Call. 225; Anderson v. Dudley. 5 Call.

529; *Perkin's Adm'r v. Hawkins Adm'r*, 9 Grat. 653-'4; *Beasley v. Robinson & als*, 24 Grat. 330.)

(g), The phrase "*to the court now here shown*" is called *profert*, and is applied at common law to all *sealed instruments* relied on in pleading, and also to letters of probate and administration. But our statute declares, that it shall not be necessary to "make *profert* of any deed, letters testamentary, or commission of administration." And a defendant may have *oyer* in like manner as if *profert* were made. (V. C. 1873, c. 167, § 9.)

(h), This date, &c., is *descriptive of the writing* sued on, and as it constitutes *its identity*, it must be accurate. The *videlicet* will not avail to cure any incorrectness.

(i), If the instrument be a *promissory note*, the phraseology here employed is as follows: "made his certain note in writing, commonly called a promissory note, the date whereof is the day and year aforesaid, and thereby promised and agreed to pay to the said plaintiff the said sum of one thousand dollars, above demanded," &c.

(k), If the writing is payable not on demand, but on a specified day, say "to be paid to the said plaintiff on or before the — day of — in the year of our Lord —."

(l), This allegation of "*often requested*" is generally a mere form, and under the provision of the statute above referred to (V. C. 1873, c. 167, § 10,) may be omitted where no request is necessary. If a request is necessary, as it is where the writing is payable *so many days after demand*, or on demand *at a particular place*, and in some other cases, the allegation of a demand must be formally made, and then the general "*licet sapius requisitur*" is not sufficient.

(m), This form of expression is employed, although part may have been paid.

(n), The damages *in debt* are merely nominal, with the exceptions already mentioned, namely, the action of debt on a *bond with collateral condition*, and on a *penal bond* where the principal and interest together *exceed the penalty*.

(o), This final phrase "*inde producit sectam*," has been already explained.

(2), *Declaration in Ejectment for Dower*.

See St. Pl. 33; Id. (Tyler's Ed.) 71; V. C. 1873, c. 131, § 6 & seq; Id. c. 106, § 10:

Title of Court and Rules. Circuit Court of A. County, to wit: ——— Rules ———.

Queritur.

Statement of the Cause of Action.

Mary Demandant complains of Thomas Tenant of a plea of trespass for this, to wit: that therefore, to wit: on the first day of January, in the year of our Lord eighteen hundred and seventy, the said plaintiff was possessed for her own life, as and for her dower in

the estate of her late husband, George Demandant, deceased, of one undivided third part of a certain tract or parcel of land, called Glenmore, lying in the said county of A., containing six hundred acres, and bounded as follows, to wit:

[Insert a description of the land as accurate as may be.]

of which said tract of six hundred acres of land the said George Demandant was, during the coverture between him and the said plaintiff, (and at the time of his death,) seised of an estate of inheritance; and the said plaintiff says, that she being possessed of the undivided third part aforesaid of the said tract of land, the said defendant afterwards, to wit, on the second day of February, in the year of our Lord eighteen hundred and seventy, entered into the same, and unlawfully withholds from the said plaintiff the possession thereof, to the damage of the said plaintiff \$2,500 ⁰⁰/₁₀₀ and therefore she brings her suit.

W., p. q

Conclusion.

Notice.

To Mr. Thomas Tenant:

You are hereby notified that the foregoing declaration in ejectment against you will be filed in the clerk's office of the circuit court of A. county, at rules to be olden for the said court, on the first Monday of —, in the year of our Lord eighteen hundred and —.

MARY DEMANDANT,

By her Attorney.

Observations on the Foregoing Declaration.

The action of ejectment, as has been before remarked, is intended by statute in Virginia to supersede, not indeed *in theory*, but *in practice*, all other remedies for the recovery of lands, except the *writ of forcible entry, &c.* It is declared that it shall lie in the same cases as at common law it did, and may be prosecuted by any person claiming real estate *in fee, for life or for years*, either as heir, devisee, purchaser or otherwise, even by a widow for her dower unassigned, (V. C. 1873, c. 106, § 10; Devaughn v. Devaughn, 19 Grat. 558,) thus providing a new practical substitute for the *writ of dower* and the *writ of right of dower*. (V. C. 1873, c. 131, § 12.)

It is to be instituted in the county or corporation where the land, or part of it, lies, and by him only who has a *subsisting interest* in the premises claimed, and a right to recover the same, or to recover the possession thereof, or of some share, interest, or portion thereof. (V. C. 1873, c. 131, § 3, 4.) And in the same spirit of dispensing with former fictions, the actual occupant shall be named defendant; and if there be no actual occupant he who claims title to it at the beginning of the suit; and if the defendant be a lessee, the landlord may appear and be made a defendant with him, or in his place. (V. C. 1873, c. 131, § 5.)

The action is to be commenced *without a writ*, by serving a declaration in the name of the real claimant as

plaintiff; and it is declared to be enough to aver in it, that on some day specified therein, and after the plaintiff's title accrued, he was possessed of the premises claimed, and that being so possessed thereof, the defendant afterwards on some day to be stated, entered into such premises, and unlawfully withholds from the plaintiff the possession thereof, to his damage such sum as the plaintiff shall state. (V. C. 1873, c. 131, § 7.) The premises claimed are to be described with convenient certainty, so that from such description *possession thereof may be delivered*. (Beverly v. Fogg, 1 Call. 484; Turberville v. Long, 3 Hen. & M. 309; Lovel v. Arnold, 2 Munf. 167; Urquhart v. Clarke & als, 2 Rand. 549; Koiner v. Rankin, 11 Grat. 420; V. C. 1873, c. 131, § 8.) The plaintiff shall also state whether he claims *in fee, or for life, or for the life of another, or for years*, specifying such lives or the duration of such term; and when he claims an undivided share, or interest, he shall state the same. A declaration may contain one or several counts, and several parties may be named as plaintiffs, *jointly in one count, and separately in others*, (V. C. 1873, c. 131, § 9, 10; See v. Greenlee, 6 Munf. 303.) To the declaration a notice in writing is subjoined by the plaintiff or his attorney, addressed to the defendant, informing him that the declaration will be filed on some specified rule-day, *in the clerk's office* of the court where the suit is instituted, or *in court* on some named day in the next term. This notice is to be served like other notices, (V. C. 1873, c. 163, § 1, 2 & seq); and the defendant may demur or plead to the declaration, or may do both, as in personal actions, (V. C. 1873, c. 131, § 11, 12.) He may plead *in abatement*, (Jas. Riv. & Ka Co. v. Robinson, 16 Grat. 434,) but in respect to matter *in bar of the action*, he is confined to plead the general issue "*not guilty*," under which the same evidence and proceedings are admissible as under the same plea in ejectment at common law, with a few exceptions. And the defendant may also give in evidence under it whatever would bar a writ of right. (V. C. 1873, c. 131, § 13.)

The *consent-rule* is abolished, having been indeed, as we have seen, a mere incident to the fictions formerly employed in ejectment, and of course disappearing with them. The plaintiff need not prove an actual entry on or possession of the premises demanded, or receipt of any profits thereof, nor any entry, lease, or ouster, except as in other parts of the statute provided; but it shall be sufficient for him to show a *right to the possession* of the premises at the time of the commencement of the suit.

(V. C. 1873, c. 131, § 14; *Tapscott v. Cobbs*, 11 Grat. 172.)

The student will remember, that upon filing the declaration, with proof of the service of notice thereof, the plaintiff is entitled to a rule upon the defendant to appear and plead upon the next rule-day, if the declaration be filed at rules, or if filed in court to appear and plead within such time as shall be prescribed by the court; and if upon *service of such rule* he shall fail so to appear and plead, his default shall be entered and judgment given against him in the office. (V. C. 1873, c. 131, § 12.)

Where the action is by one or more tenants in common, joint-tenants, or co-parceners, against their co-tenants, the plaintiff shall be bound to prove *actual ouster*, or some other act amounting to a total denial of the plaintiff's right as co-tenant, (V. C. 1873, c. 131, § 15), which, however, is no more than had before been repeatedly adjudicated to be necessary at common law. (*Doe, &c. v. Hill*, 10 Leigh, 457; *Purcell, &c. v. Wilson*, 4 Grat. 16 *Buchanan v. King's Heirs*, 22 Grat. 415.)

Where the action is against several defendants, and a joint-possession of all is proved, and the plaintiff is entitled to a verdict, it shall be against all, whether they plead separately or jointly. (V. C. 1873, c. 131, § 16.)

Where the action is against several defendants, and it appears at the trial that any of them occupy distinct parcels, in severalty or jointly, and that other defendants possess other parcels separately or jointly, the plaintiff may recover *several judgments* against them, for the parcels so held by one or more of the defendants separately from the others. (V. C. 1873, c. 131, § 17; *Stuart's Heirs v. Coalter*, 4 Rand. 85, 88; *Camden & als v. Haskill*, 3 Rand. 462.)

The plaintiff may recover any specific or any undivided share or part of the premises, though it be less than he claimed in the declaration; and in a controversy touching real estate, possession of part shall not be construed possession of the whole, when an actual adverse possession is proved. (V. C. 1873, c. 131, § 18, 19; *Callis v. Kemp*, 11 Grat. 78; *Koiner v. Rankin's Heirs*, 11 Grat. 420.)

As a plaintiff can in no case assert, in an action of ejectment, any but a *legal title*, (the proceeding being in a court of law,) so the defendant cannot in general set up as a defence to an action of ejectment any but a legal title; but if he has only an equitable title, he must go into a court of equity to assert and make it good. There are two cases, however, of equitable title which, as often

occurring, the legislature has thought fit to submit to the cognizance of a legal tribunal in the action of ejectment. These two cases are—

(1). Where a vendor, or any claiming under him, shall institute an action of ejectment, to recover the land against the vendee, or those claiming under him, and there is a writing stating the purchase and the terms thereof, signed by the vendor or his agent, and there has been such payment or performance of what was contracted to be paid or performed on the part of the vendee, as would *in equity* entitle him, or those claiming under him, to a conveyance of the legal title of such land from the vendor, or those claiming under him, without condition.

(2). Where a mortgagee, or trustee in a deed of trust, made to secure the payment of a sum of money, or the performance of a duty, or the accomplishment of a purpose, shall institute an action of ejectment to recover the land of the mortgagor, or grantor in the deed of trust, after the payment of the whole sum, or the performance of the whole duty, or the accomplishment of the whole purpose, so that the defendant in a court of equity would be entitled to a decree re-vesting the legal title in him without condition.

But a defendant cannot avail himself of these equitable defences unless notice in writing of such defence be given sixty days before the trial; and whether he shall or shall not make or attempt such defence, he is not precluded from resorting to equity for any relief to which he would have been entitled had the foregoing provisions not been made. (V. C. 1873, c. 131, § 20–22.) And it is worthy to be noted, that where the defendant in ejectment has entered upon the possession *by consent of the owner*, as upon an agreement to purchase, there must be proved a demand of the surrender of the premises before the action can be maintained. (*Twyman v. Hawley*, 24 Grat. 414–'15.)

As to the *verdict of the jury* in an action of ejectment, if the opinion of the jury be for the plaintiffs, or any of them, the verdict shall be for the plaintiffs, or such of them as have right to the possession of the premises, or any part thereof, against such of the defendants as were in possession thereof, or claimed title thereto at the commencement of the action; and where any plaintiff appears to have no right, the verdict as to such plaintiff shall be for the defendant; and it is to be observed, that whilst, if the right of the plaintiff is proved to all the premises claimed, it suffices that the verdict shall be for the premises generally, as specified in the declaration; yet, if the verdict be

for only a part or share of the premises, such part must be specified with the same certainty of description as is required in the declaration. And if the verdict be for an undivided share or interest, or a part of an interest, it shall specify the share or interest, and describe the part as before required. The verdict is also to specify whether the estate found in the plaintiff be in fee or for life, stating for whose life, or whether it be for a term for years, and stating the duration of such term. (V. C. 1873, c. 131, § 23, 27.) And where the declaration sets forth a fee simple title, describing the land by quantity and boundaries, and upon the general issue of "*not guilty*," &c., the jury find that "the defendant is guilty in manner and form as the plaintiff in his declaration hath complained," it is sufficient, though not a literal compliance with the statute, and judgment ought to be given for the land. (Hawley v. Twyman, 24 Grat. 518.)

In order to enable the plaintiff to recover damages in the action of ejectment, he must file with his declaration a statement of the profits and other damages which he means to demand; and in that case the jury, unless the court shall otherwise order, may assess the damages for *mesne profits* for any period not exceeding five years prior to the commencement of the suit, until the verdict; and also damages for the destruction or waste of buildings, or other property, during the same period. (V. C. 1873, c. 131, § 30.)

Provision is also made to a limited extent for allowing for the value of improvements made by the defendant, when the plaintiff recovers the land. (V. C. 1873, c. 131, § 32, 33; Id. c. 132.)

The judgment for the plaintiff is, "that he recover the possession of the premises," according to the verdict, if there be a verdict, or if the judgment be by default, or on demurrer, according to the description thereof in the declaration; and if the action be brought to recover dower, which has not been assigned, the court may have the dower assigned by commissioners appointed for that purpose. (V. C. 1873, c. 131, § 29; Id. c. 106, § 10.)

Any judgment in an action of ejectment is conclusive as to the right of possession established in such action, upon the party against whom it is rendered, and upon all persons claiming under him, allowing to *infants, married women, and persons insane*, at the time of judgment, *five years* after the removal of such disabilities.

4°. Office-Judgments.

Office-judgments, (that is, judgments in the *clerk's office*, in contradistinction to judgments rendered in *court*), are,

(1), Judgments for *default of appearance*; (2), By *confession*; and in this connexion we must advert to, (3), When and how office-judgments are set aside; (4), The making of the court-docket before the term; and (5), The entries at the rules, and the form of the rule-book;

W. C.

1st. The Judgment for *Default of Appearance*.

Having just seen when and where the plaintiff is to file his declaration, together with the form and general principles of its structure, and an example or two by way of illustration, let us next consider what follows, if the defendant disregard the rule made upon him to answer it. This rule is called the *common order*, because it is the *usual order*; or the *conditional judgment*, because it threatens the defendant with a judgment, unless he appear and plead according to its terms. Those terms, it may be proper to say, are as follows: "The defendant having been summoned, (or being arrested), and not appearing, on the motion of the plaintiff, by his attorney, it is ordered that judgment be entered for the plaintiff against the defendant, for the debt in the declaration mentioned, (supposing it to be a *plea of debt*), with lawful interest thereon from the — day of —, in the year —, till paid, and the costs, unless the said defendant shall appear and plead at the next rules." (Robinson's Forms, 61.) And if the defendant shall omit to plead at the succeeding rules, a judgment is then entered against him in the clerk's office, (whence it is styled an *office-judgment*), or as it is sometimes styled, and as in terms it is, a *confirmation of the common order*; and at the same time an order is made for the damages to be inquired into, when in consequence of the defendant's liability, or the amount of the demand *not being definitely ascertained*, such inquiry is proper. (V. C. 1873, c. 167, § 43.)

We are to note under this head, (1), The period of the proceedings at which judgment for default of appearance is rendered; (2), When an office-judgment becomes final, and the amount thereof; (3), In what cases a writ of inquiry is requisite, and the mode of executing it; and (4), Proceeding where the cause is ready as to some and not as to others of the defendants;

W. C.

1st. Period of the Proceedings at which Judgment for Default of Appearance is Rendered.

From the explanation just given it appears that judgment for default of appearance occurs regularly at the *second rule-day* after the declaration is filed. But it is

provided that no judgment by default, on a *scire facias*, or summons shall be valid if it become final within *one month* after the service of such process. (V. C. 1873, c. 166, § 6.) The month contemplated is a *calendar month*, and in computing it the day on which the summons is served is to be counted, but not the day on which the judgment becomes final. (V. C. 1873, c. 15, § 9 (cl. 7, 8.)) Hence, where the process was served on the 3d of February, and the judgment by default became final on the 3d of March, it was held to be a valid judgment. (Turnbull v. Thompson, 27 Grat. 308.)

The cause is then placed *on the docket*, or list of causes, to be disposed of at the next term of the court, and thenceforward all further proceedings therein must be had *in court*; that is, in the circuit court at *any term*, and in the corporation court *at the four or more terms yearly*, which shall be designated by the judge for the *trial of civil causes, in which juries shall be required*. (V. C. 1873, c. 173, § 1.) And in order to obviate needless delay by putting in sham pleas at the rules, and so preventing an office-judgment, it is now provided that, "in any action where, for want of a plea, an office-judgment would have been entered, it shall be the duty of the clerk, whether a plea shall have been filed or not, to place such action upon the court-docket; and in any such action so placed upon the court-docket the pleadings *may be matured in court*, subject to such terms of continuance as the court, in its discretion, may impose upon either party." (Acts 1874-'5 p. 48, c. 65.)

With a view to the same wholesome policy of obviating needless delay, it is also provided that when the plaintiff takes issue on the defendant's pleading, or traverses the same, or demurs, so that the defendant is not let in to allege any new matter, the plaintiff may, without giving any rule to rejoin, proceed as if there were a similitur or joinder in demurrer. (V. C. 1873, c. 167, § 28; Southside R. R. Co. v. Daniel, 20 Grat. 344); but during the next term of the circuit court, or at least until the 15th day thereof, if the term should last longer, or if it be in a corporation court, during the next term designated *for the trial of civil causes in which juries are required*, the defendant is allowed to set aside the judgment thus rendered against him in the office, by appearing and *pleading to issue*, as the statute expresses it; that is, by pleading a plea not in abatement, nor of a merely dilatory character, (Wall v. Atwell, 21 Grat. 403; 5 Rob. Pr. (2nd ed.) 200, &c.); but offering *some substantial defence* to the action; and thereupon the plaintiff

may, at his option, reply immediately, or take until the next term to consider what he will do. But the defendant must come prepared to sustain his plea, if the plaintiff should forthwith deny and take issue upon it; or he must show cause, upon oath, why the cause should stand over, or as the phrase is, *be continued* until the next term. (V. C. 1873, c. 167, § 45-'6.)

2^d. When an Office-judgment becomes *Final*, and the Amount thereof.

If, during the term next following the judgment in the office, as above described, or in the circuit court, before the expiration of the 15th day thereof (whichever shall first happen), the judgment be not set aside in the manner above stated, by the defendant's appearing and pleading *to issue*, it becomes (if there be no order for an inquiry of damages) a final judgment as of the last, or of the 15th day of the term, as the case may be, and has in all respects the same effect as a judgment rendered in court at such term, and therefore, cannot be afterwards set aside by that court, (*Enders v. Burch*, 15 Grat. 68; V. C. 1873, c. 167, § 45.) The judgment in such case (supposing there is no writ of inquiry of damages), is for the principal sum due, with interest thereon from the time it became payable, (or commenced bearing interest), until payment, unless in an action upon negotiable paper, when it includes, besides the principal sum, with interest thereon, the *cost of protest and interest upon the same*, and in the case of *bills of exchange*, the *damages allowed by law*; and in certain cases, the amount of the *account of items filed* with the declaration. (V. C. 1873, c. 167, § 44; *Id.* c. 141, § 11.)

But where there is an order for an inquiry of damages (which is familiarly known as a *writ of inquiry*, because in England a *writ* for the purpose is actually issued), the judgment in the office is *not final*, either at the next or at any succeeding term of the court, *until the order is executed*; and even if the order be executed during the term next following the judgment, it may be set aside before the end of the term, or in the circuit court before the 15th day thereof *if good cause be shown*, but not otherwise. (V. C. 1873, c. 167, § 45-'6.)

Since, therefore, the finality of an office-judgment after the term which next follows it, depends on whether there be an order of inquiry of damages, it is necessary to consider when such an order is requisite.

3^d. In what Case a *Writ or Order of Inquiry is Necessary*, and the Mode of Executing it.

An inquiry of damages is, in general, requisite

cases where the *amount* of the demand, and the *defendant's liability* to pay it, are not ascertained (at least *prima facie*,) by his own *written acknowledgment*, or something equivalent thereto. Hence it must take place in all cases, except in an *action of debt on a bond or other writing for the payment of money*, or against the drawers or endorsers of a bill of exchange, or negotiable note; or in an *action of debt*, or writ of *scire facias*, upon a judgment or recognizance, or in an action of *assumpsit*, provided the plaintiff shall serve the defendant, at the same time and in the same manner that the process or summons is served, with a copy certified by the clerk, of *the account on which the action is brought*, stating distinctly the several items of his claim, and the aggregate amount thereof, the time from which he claims interest, and the *credits, if any*. (V. C. 1873, c. 167, § 44; Jas. River & K. Co. v. Lee, 16 Grat. 432.)

Thus an order or writ of inquiry is necessary in all actions of ejectment, and for other torts, (Jas. Riv. & K. Co. v. Lee, 16 Grat. 432,) in actions on bonds with *collateral condition*; e. g., a guardian's bond, (Ruffin v. Call, 2 Wash. 181; Henderson v. Hepburn, &c., 2 Call. 238;) or where it appears from a paper filed by the plaintiff himself, that the defendant *may be entitled to a credit*, which yet the plaintiff refuses to allow, (Rees v. Conococheague Bank, 5 Rand. 327.) And if the principle were rigidly adhered to, a similar inquiry should also be made in actions against the endorsers of negotiable paper, and the drawers of bills of exchange, whose liability is collateral, depending on whether the holder of the paper has proceeded properly with it or not, (Metcalf v. Battaille, Gilm. 191; Hatcher v. Lewis, 4 Rand. 154;) and perhaps also in actions *on judgments*, (Shelton v. Welsh, 7 Leigh, 175,) and certainly in actions of *assumpsit*. But our statutes at present include, as we have seen, all of the three cases last mentioned, amongst those where no writ of inquiry need be ordered.

The writ or order of inquiry is in England addressed *to the sheriff* of the county where the pleadings allege the fact to have occurred, and commands him to inquire into the amount of damages sustained, "by the oaths of twelve good and lawful men of his county," and to return such inquisition when made to the court. (St. Pl. 105-'6; Id. (Tyler's ed.) 184.) With us *no writ issues*, but the *order* is executed *in court*, generally by a jury; although, if neither party desire a jury, it is made the duty of the court to ascertain the damages, and on what sum, and from what time interest shall be computed,

and to give judgment for such damages and interest. (V. C. 1873, c. 173, § 6.)

- 4th. Proceeding where the Cause is ready as to some, and not ready as to others, of the Defendants.

Hitherto it has been supposed that there is but one defendant, or if more than one, that they have been all duly summoned; but it may well happen, and in point of fact does often happen, where there are several defendants, that the process shall be executed on some and not on others. In such a case the common law rule was, that where two or more were sued upon a *joint contract*, the plaintiff could not have judgment against any until he had actually or constructively summoned all, or had proceeded to *outlawry* against such as he did not summon. (1 Tidd's Pr. 420-'23; Sheppard v. Baillie, 6 T. R. 326; Bovill v. Wood, 2 M. & S. 23; Saunderson v. Hudson, 3 East. 144; Barton v. Petit, 7 Cr. 194.) The practice, however, having been long otherwise in Virginia, the general consent thus signified was considered, in Moss v. Moss' Adm'r, 4 Hen. & M. 293, (1809), to have altered the law in this respect, and so it continued to be understood for many years. But in Early v. Clarkson's Adm'r, 7 Leigh, 83, (1836), the irregularity was regarded as too great to be tolerated, and a judgment by default against one of two joint contractors in an action against both, (one not having been summoned) was reversed. The Legislature then interposed and sanctioned the usage which had prevailed so long; enacting that where, in an action against two or more defendants, the process is served on part of them, the plaintiff may proceed to judgment as to any so served, and either discontinue it as to the others, or from time to time, as the process is served as to such others, proceed to judgment as to them, until judgment is obtained as to all. (V. C. 1873, c. 167, § 50; Mills v. Central Savings Bank. 16 Grat. 96.)

It should be observed (as has been already explained), that the court is invested with full control over the proceedings in the clerk's office, during the *preceding vacation*, a phrase which in corporation courts means the intervals, not between every term, but between those terms designated by the court, *in which jury causes are tried*, (Insurance Co. v. Bailey's Adm'r, 16 Grat. 363); so that it may re-instate a cause discontinued during the vacation, may set aside any of the proceedings therein at rules, correct mistakes in them, and make such order in them as is just. (V. C. 1873, c. 167, § 52; Southall v. Exchange Bank, 12 Grat. 315; Mills v. Central Savings

Bank, 16 Grat. 96; Insurance Co. v. Bailey's Adm'r, 16 Grat. 363, 382.)

2^d. Judgments *by Confession* in the Clerk's Office.

Thus far the proceedings in the office, after the declaration is filed, have been supposed to take place by *default of defendant*; but it may happen that *he appears*, and he may then *confess the action* of the plaintiff or what more frequently occurs, he may proceed to concert his defence thereto.

The defendant was always allowed to acknowledge the plaintiff's action, and confess a judgment for the amount claimed, or for such part thereof as he and the plaintiff could agree upon, *provided it was done in open court*. But a confession of judgment *in the clerk's office* was never contemplated by the *common law*, and can only take place in pursuance of the authority of some statute. Formerly our statutes permitted it only where the defendant was *in actual custody*, and not being able to give bail, wanted to relieve himself by confessing a judgment, and in case the plaintiff should thereupon desire to have him detained in custody, as on execution, by taking the insolvent debtor's oath, and so obtaining his discharge. At present, however, the defendant *in any suit* may confess a judgment in the clerk's office for the whole claim, or for so much, principal and interest, as the plaintiff may be willing to accept a judgment for. The same shall be entered of record on the order or minute-book, and be as final and valid as if entered in court on the day of such confession, except merely, that the court shall have such control over it at the next term as has been already explained. (V. C. 1873, c. 167, § 42.) From this language it appears that this act authorizes a confession of judgment in the clerk's office *only in vacation*. But it is considered to be confessed in vacation when acknowledged on the morning of the first day of the term, before the hour for the opening of the court. (Brown v. Hume, 16 Grat. 456.) But, as has already been intimated, if the defendant appear at the rules at all, it is generally not to acknowledge the plaintiff's right of action, *but to contest it*. If that be his purpose, he must appear, either at the rules at which the declaration is filed, or at those next succeeding, and the alternate statements of the parties may then be made from rule-day to rule-day, until an issue is made up; or as the statute expresses it, the rules may be, "to declare, plead, reply, rejoin or for other proceedings; they shall be given from month to month." (V. C. 1873, c. 167, § 4.)

3^d. When and How *Office Judgments* are set aside.

We have seen that an office judgment can only be set aside *at the next term* of the court, by *pleading to issue*, which means a plea to the substantial merits of the action.

Hence, a *plea in abatement* or a *special demurrer*, (while special demurrers existed) or any other merely *dilatory defence*, not applicable to the merits, is not admissible for that purpose, unless indeed, where the ground of the defence originated *since the last continuance* of the cause,—*puis darrein continuance*. (Hunt v. Wilkinson, 2 Call, 65; Bradley v. Welch, 1 Munf. 285; Furniss & als v. Ellis & als, 2 Brock. 18.) And hence also, these dilatory defences must be presented *before an office judgment is entered*, or not at all, unless where they may have occurred *since the last continuance*. The plea of *non est factum*, in an action on a sealed instrument, is a plea to the merits, with which an office judgment may be set aside, (Franklin v. Cox, 4 Rand. 448); as is the plea of the *statute of limitations* (Tomlin v. How, 1 Gilm.); or a *general demurrer* (Symne v. Griffin, 4 Hen. & M. 277); and it has even been said, doubtless inaccurately, a *special demurrer* also, (Furniss v. Ellis, 2 Brock. 14, 17); and these are only instances of an infinite number of *issuable pleas, pleas to the issue, pleas to the merits, pleas to the action, or pleas in bar*, (all which phrases indicate pleas of the same character,) whereby an office judgment may be set aside.

4^t. Making out the *Court-Docket before the Term*.

It is made the clerk's duty, *before every term* of the circuit court, and every term of a corporation court designated *for the trial of jury causes*, to make out a *docket* or list of the causes pending, placing Commonwealth's causes first, and afterwards motions and actions in the order in which they were matured for hearing, (V. C. 1873, c. 273, § 1.)

Hence, if the court commences its session on any of the days set apart for the *holding of rules* at which an office judgment is entered, that judgment cannot be included in the docket, because in general the rules are then open, and the defendant is at liberty to plead during the whole period of their continuance. And the clerk, therefore, making up his docket *before the term*, must omit such causes as are *then* not matured. (White v. Archer, 2 Va. Cases, 201; Botts v. Pollard, 11 Leigh, 433; Hale v. Chamberlain, 13 Grat. 658.)

To obviate the delay which might thence sometimes arise, it is provided, as we have seen, that if the term happens to commence on the first Monday in the month, or either of the two following days, or on the preceding

Tuesday, Wednesday, Thursday, Friday or Saturday, the rules, which otherwise would have been held for the said month on the first Monday, shall be held on the last Monday in the preceding month. And when the term shall commence on the Monday before the first Tuesday in any month, the rules shall be held on the Monday before the commencement of the term; and still further, to prevent delay, it is provided that although in general the rules shall *continue three days*, yet where such continuance would interfere with the term of the court, they shall not continue beyond the day preceding the commencement of the term. (V. C. 1873, c. 167, § 1.)

5^f. The Entries at the Rules, and the Form of the Rule book.

The rules entered from month to month are noted by the clerk in a book kept for the purpose, (V. C. 1873, c. 167, § 2,) and from the brief *memoranda* there set down a complete and formal record is made, if it become necessary to remove the cause by process of appeal to a higher court, or if such record be for any purpose desired.

The form of this *rule-book* will illustrate the whole subject of proceedings at rules, and is therefore annexed, the student being desired to make himself familiar with the entries therein in each case.

2^d. The Defence.

In following out this the second step in the conduct of the pleadings, the student's attention is invited to, (1), Certain incidents to the pleading which generally occur, if they occur at all, at this stage; (2), The general principles of the defence; and (3), The form of the defence;

W. C.

1^o. Certain Incidents to the Pleading.

Before entering upon the account of the defence, it will be proper to advert to certain incidents of occasional occurrence, whereby the progress of the pleadings may be sometimes varied, and which almost universally take place, if they happen at all, at this stage of the altercation. These incidents are, (1), *Imparlances*; (2), *Views*; (3), *Aid-Prayer*; (4), *Voucher to warranty*; (5), *Oyer*; (6), *Parol demurrer*; (7), *Payment of money into court*. Some of these no longer exist in our practice, or in that of England, but they have left relics behind them which make it desirable that the student should not be ignorant of their nature;

W. C.

1^f. *Imparlances*.

An *imparlance*, or *licentia concordandi*, Blackstone explains to be time granted the defendant before he pleads, to see if he can end the matter amicably, without further

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suit, by talking with the plaintiff, "a practice which is supposed," says he, "to have arisen from a principle of religion, in obedience to that gospel precept: 'Agree with thy adversary quickly, while thou art *in the way* with him.' And it may be observed, that this gospel precept has a plain reference to the Roman law of the XII tables, which expressly directed the plaintiff and defendant to make up the matter while they were '*in the way*,' or going to the prætor." (3 Bl. Com. 299.) For a more detailed explanation, see St. Pl. 72, n (12); Id. (Tyler), 104 & seq.

An additional motive probably, and the *principal one*, for allowing this interval to the defendant, before obliging him to plead, was to give him an opportunity more deliberately to *concert his defence*; and in this aspect, imparlances have been superseded in Virginia by *Rules*, which, as we have seen, allow the space of a *month*, (from one rule-day to another,) to answer every pleading. (V. C. 1873, c. 167, § 4.)

2^d. Views.

In many of the old *real actions* the defendant might demand a *view* of the land in question, in order that he and the jury might know *with certainty* what the demandant sought to recover, and that he might thus be enabled properly to shape his defence. The right was regulated by several statutes in England, and was a prolific source of delay in the real actions to which it was applicable. (1 Reeves' Hist. Eng. Law, 433; Jac. L. Dict. *View*; Burrill's Do. *View*.) Views were at one time *in terms* abolished in Virginia; but that statute having been repealed by the Code of 1849, and the common law thereby restored, (Ins. Co. v. Bailey, 16 Grat. 384; Booth's Case, Id. 59), the demand of view may now be made as at common law, unless we are to understand it as abolished along with *writs of right*, to which, at common law, it is principally, though not exclusively incident. (V. C. 1873, c. 131, § 38.)

But a more practical sort of view has been devised by our statute, which may often be highly useful in facilitating the hearing of causes, having indeed long been in use in England in criminal causes. (Jac. L. Dict. *View*; Burrill's Do. *View*.) Our statutes declare, that the jury *in any cause*, at the request of either party, may be taken to view the premises or place, or any property, matter or thing, relating to the controversy between the parties, when the court shall think a view necessary to a just decision, provided the party proposing the view shall pay the expenses thereof immediately, to be afterwards taxed

with the other costs. (V. C. 1873, c. 158, § 37.) In determining whether a view is necessary, the court must exercise a just discretion; and if it be complained that the court errs, the circumstances must be so stated in the record, by means of a *bill of exceptions*, as to enable an appellate court to determine whether the discretion of the court below was properly exercised or not. And if the facts do not thus appear in the record, it will be naturally presumed that the court below *acted rightly*. (Balt. & O. R. R. Co. v. Polly & als, 14 Grat. 447.)

For a demand of view, writ, and return at common law, see 3 Chit. Pl. 1393.

3^d. Aid-Prayer.

In real actions the tenant might, at common law, *pray in aid* (as it was styled), or call for assistance of another to help him plead, because of the weakness of his own estate. Thus a *tenant for life* might pray in aid of him who had the inheritance in reversion or remainder; that is, that he should be joined in the action, or should help to defend the title. (3 Bl. Com. 301; 3 Chit. Pl. 1365.) *Aid-prayer* being principally incident to a *writ of right*, it is supposed to be abolished along with that action. (V. C. 1873, c. 131, § 68.) And yet for the benefit of *landlords* the privilege is reserved to them of *entering themselves* as defendants in suits for lands in the possession of a lessee. (V. C. 1873, c. 131, § 5; Mitchell v. Barratta, 17 Grat. 449.)

4^d. Voucher to Warranty.

Voucher to warranty (*vocatio*) is the calling in of some person to answer the action, who has warranted the title to the land, (for it applies only to *real actions*,) to the tenant or defendant. If the vouchee appears he is made defendant instead of the voucher. But if afterwards he makes default, or fails in the defence, recovery is had against the original defendant, and he shall recover over an equivalent in value *in lands* against the deficient vouchee. (3 Bl. Com. 300.) Voucher was another great source of delay in real actions, inasmuch as one voucher might be accumulated on another, and to each there might be a *counter-plea* (as it was called) denying the obligation to warrant, the principal suit standing still while these collateral inquiries were in progress. Hence, it was once with us abolished *in terms*, and it is supposed may be understood as done away with by our present Code, abolishing *writs of right*. (V. C. 1873, c. 131, § 38.)

5^d. Oyer.

Oyer applies, (1), To the *writ* on which the suit is founded, and (2), To any *sealed instrument* which may

be averred in the pleadings, and to letters of probate and administration, vouched by the plaintiff in his declaration.

The word *oyer* is Norman French, and simply means a claim on the part of the person resorting to it to *hear the writ* or the *writing in question read to him*, the generality of parties, in the times of ancient simplicity, being supposed to be unable to read for themselves.

When *oyer* is thus craved, the whole writ or writing is entered *verbatim on the record*, and the defendant may then take advantage of any thing which may appear in it. (3 Bl. Com. 299; St. Pl. 56; Id. (Tyler,) 88, 100 & seq.)

It was a rule of the *common law*, rigorously enforced, that the adversary could only *crave oyer* of specialties and letters of probate and administration, in those cases where *profert* had been made of them in the declaration or other pleading to be answered. And if *profert* had been omitted the adversary's proper course was to *demur*, or object to the sufficiency of the pleading on that account. But in Virginia our statutes dispense with the necessity of making *profert* of such instruments, and yet declare that *oyer* shall be had just as if *profert* had been made. (V. C. 1873, c. 167, § 9.)

In respect to *oyer of the writ* a rule was, many years ago, adopted in England, in the courts of king's bench and common bench, to deny such *oyer* when sought for the purpose of showing a variance between the writ and the declaration. (3 Bl. Com. 299, n (12); St. Pl. 50; Id. (Tyler,) 88.) This rule has never existed in Virginia, so that it is worth while for us to consider at what stage of the cause *oyer* of the writ may be had, and when consequently a variance between the declaration and the writ may be taken advantage of.

It is the practice here to allow *oyer of the writ* at any stage of the cause when it *can benefit the defendant*. This is supposed by Mr. Conway Robinson to have been at common law, only so long as the defendant could plead in *abatement*, that sort of plea or special demurrer being, in his opinion, the only modes whereby advantage could be taken of a variance between the writ and the declaration. (1 Rob. Pr. (1st. ed.) 158.) This is so indeed *at present*, by the express provision of the code, (V. C. 1873, c. 167, § 19); but it does not seem to have been true at *common law*. By the common law a variance between the writ and the declaration might have been taken advantage of by plea in abatement, or by special demurrer, if the variance were *merely formal*; but if it were *material to the merits*, not only by those two means, but also by general

demurrer, motion in arrest of judgment, or by writ of error. In the case of immaterial variances, therefore, Mr. Robinson's proposition is true; but in the case of material variances, it is believed to be undoubtedly erroneous. (Com. Dig. Pleader, (C. 13, 14); Watson v. Lynch's Heirs, 4 Munf. 94; Edwards v. Watkins, 1 Cro. (Eliz.) 185; Berkenhead v. Nuthall, Id. 198; Norton v. Palmer, 2 Cro. (Eliz.) 829; Hole v. Finch, 2 Wils. 394-'5.)

For the modes of taking advantage of a variance between the writ and the declaration at common law, see Bac. Abr. Pleas, (F.) 7; Com. Dig. Pleader, (C. 13, C. 14); Bragg v. Digby, 2 Salk. 658; Marham v. Molineux, Yelv. 120; Spalding v. Mure, 6 T. R. 363; Watson v. Lynch, 4 Munf. 94.

It is worthy of observation, that whilst, when the defendant has appeared, the writ is no part of the record *without oyer*, in order to *reverse* the proceedings, it may be freely appealed to in order to *sustain* them. (Stephens v. White, 2 Wash. 212; Moss & als. v. Moss' Adm'r, 4 Hen. & M. 309; Payne & als. v. Grim. 2 Munf. 297; Hickam v. Larkey, 6 Grat. 210.)

6^t. Parol Demurrer.

The meaning of this barbarous phrase is that the *pleadings be stayed*. It occurs at common law, where an infant is a party to a *suit for lands*, founded on his ancestor's possession, and also where an infant is sued in debt upon *his ancestor's obligation*, whereby a burden is sought to be laid on the fee simple (Bac. Abr. Infancy, &c. (I) 1; 1 Chit. Pl. 481.) Our Virginia statutes declare that the proceedings in a suit where an infant or insane person (although it is believed that the doctrine of *parol demurrer* never extended to any other but infants), is a party, are not, for that reason, to be stayed; but the court, or the clerk at rules, may appoint a guardian *ad litem*, whether defendant has been served with process or not; and the guardian is *compelable to act*, though not liable for costs, and is to be allowed his reasonable charges, to be paid by him who had him appointed. (V. C. 1873, c. 167, § 17; Talley v. Starke, 6 Grat. 329.)

7^t. Payment of Money into Court.

The practice of the *payment of money into court* is of modern origin, having been introduced in the latter part of the seventeenth century, in consequence of the restricted application of the *plea of tender*. In Gregg's case, 2 Salk. 597, Lord Holt declares that he recollected the beginning of the practice, and that at first it was confined to the case of principal and interest *on a bond*, although afterwards it was also extended to the action of *indebitatus*

assumpsit, where the amount to be recovered was capable of being *reduced to a certainty*.

In order to understand the subject, some explanation of the plea of tender is requisite. The plea of tender is appropriate wherever any one claims *any certain and ascertained right or duty* from another, being founded on the obvious reason that it is not allowed the creditor to vex or harass his debtor for a right or duty which the latter has *already offered, and is still willing to satisfy*.

The effect of the plea of tender in a few cases, to which it is not now needful to advert, is to *extinguish the obligation*, (See 2 Th. Co. Lit. 71, &c.; Bac. Abr. Tender, (F);) but in general, it is merely to relieve the debtor from *subsequent interest*, and from *costs*, (Bac. Abr. Tender, (F).) Hence it was always deemed essential to a tender that it should be made *on the day the debt was due*, and not afterwards; for if not made then, it could not of course save the damages arising from the debtor's want of punctuality, which damages were not always measured (as they are now,) by *interest*. It was also necessary, where the tender did not extinguish the obligation, that the debtor should remain *always ready (tout temps prest, or uncore prist)*, with the money afterwards, so that, if it were afterwards demanded unsuccessfully, the effect of the tender was thereby defeated.

These incidents of tender (namely, that it was available only where the amount was *certain*; that it must be made on the *very day the debt was due*; and that the money must *always be kept ready* afterwards,) so restricted its application, that at length, in the time of Charles II, the practice mentioned by Lord Holt, (for it began as a *mere usage*,) of *payment of money into court* was adopted, (Bac. Abr. Tender, (K); Giles v. Hartis, 1 Ld. Raymond, 254.) By this means the defendant, whenever the debt was *ascertained*, (but not in actions for *unliquidated damages*,) might obtain a rule to *pay the money into court*, with interest and costs up to that stage of the action, which the plaintiff might accept and dismiss his suit; but if he chose to prosecute it farther, and recovered upon the trial no more than had already been paid into court, the judgment for the subsequent costs went against him. (Bac. Abr. Tender, (K) to (P); 1 Saund. 133, & n 2.)

By statute 3 and 4 Wm. IV. c. 42, this proceeding is extended to *all personal actions*, except certain actions for tort, *as assault and battery, &c.*; and that policy has been adopted in Virginia as to *all personal actions* without exception. (St. Pl. (ed. 1845,) App'x cxxiii.)

Our statute provides, that in any personal action the

defendant may pay into court to the clerk a sum of money on account of what is claimed, or by way of compensation and amends, and plead that he is not indebted to the plaintiff (or that the plaintiff has not sustained damages), to a greater amount than the said sum. The plaintiff may accept the sum, either in full satisfaction and then have judgment for his costs, or in part satisfaction and reply to the plea generally. And if the issue thereon be found for the defendant, judgment shall be given for the defendant, and he shall recover his costs. (V. C. 1873, c. 168, § 2, 3.)

It may well be questioned whether it is judicious thus to have extended the latitude of the English statute. It shocks the natural sense of right, that a wrong doer, who has perhaps inflicted the most grievous of injuries, should be permitted to *measure his own wrong*, and to cast upon the plaintiff the alternative of accepting the *defendant's estimate* of the wrong done by him, or of being exposed to the heavy costs of prosecuting the litigation.

2°. The General Principles of the Defence.

Let us advert to (1), The general principles of the defence at common law; and (2), As modified by statute in Virginia;

W. C.

1°. The General Principles of the Defence at Common Law.

The general principles of the defence at common law will be sufficiently elucidated by the exposition of the statutory modifications introduced in Virginia, and by the subsequent discussions. It must suffice here simply to refer to the authorities following: See 1 Chit. Pl. 460 & seq; 474 & seq; 502 & seq; 511 & seq; 537 & seq; Com. Dig. Pleader, (E), (E. 1), &c; 5 Rob. Pr. 6, 7 & seq; Id. 153 & seq.

2°. General Principles of the Defence as modified by Statute in Virginia.

Our statute corresponds with the statute 3 and 4 Wm. IV, and the rules of Court of Hilary Term, (1834) in many particulars, (St. Pl. (ed. 1845) 181-'2;) and the object of these provisions, both in England and with us, is to do away with the *absolute singleness* of plea required by the common law, and to dispense with all those *mere formalities of expression* which tend to needless prolixity, and which cannot be denied, and are not required to be proved.

The particulars of the statutory modifications touching the defence to an action, as adopted in Virginia, may be presented under the heads following, namely, (1), The defendant may plead as many several matters of law or fact as he shall think necessary; (2), No formal defence

is required in a plea; (3), The mode of introducing a second or subsequent plea; (4), Use of the phrases "*actionem non*," and "*precludi non*," and of the prayer of judgment; (5), The doctrine of protestation; (6), The conclusion of a special traverse as prescribed; and (7), Provision to dispense with a *similiter*, or a joinder in demurrer;

W. C.

- 1st. The Defendant may *plead* as many *Several Matters*, *whether of Law or Fact*, as he shall think necessary.

It is at common law a steadfast principle of pleading, that *duplicity* of allegation is to be avoided; a principle resulting from the purpose and object of the art, which contemplates the production of a *single issue* upon the *same* subject-matter of dispute; and independently of statute, it applies alike to all stages of the altercation. Each *count* in the declaration must set forth but one cause of action; the plea thereto, but one matter of defence; the replication, but one answer to the plea, &c. In respect to the plea, which is now the subject of consideration, the principle in question not only inhibits more than one plea to each cause of action, but every plea must be simple, entire, connected, and confined to one single point. It must never be entangled with a variety of distinct, independent answers to the same matter, which must require as many different replies, and introduce a multitude of issues upon one and the same dispute. For this would often embarrass the jury, and sometimes the court itself, and in all cases would tend to enhance the expense to the parties. (3 Bl. Com. 311; 1 Chit. Pl. 253, 564, 592.)

To this general principle of avoiding duplicity, there is, in respect to the *declaration*, even at common law, a qualification growing out of the occasional employment of several counts, *purporting* to be founded on *distinct* demands, as already explained, (*Ante*, p. 575, & seq); and in respect to the *plea*, three qualifications present themselves, one arising out of the obvious necessity of allowing a distinct answer to *each count*, where there is more than one count; another depending on the doctrine that where there are several defendants, one may plead one matter, and another another matter, to the same cause of action, thus *severing*, as it is called, in their defence; and yet a third, where the defendant proposes to put his defence to one part of the plaintiff's complaint or demand on one ground, and to another part on a different ground. (1 Chit. Pl. 260, 564, 596; Com. Dig. Pleader, (E. 2); St. Pl. 255-'56 & seq.) And of

course in those cases where there are several pleas, one replication must be allowed to *each plea*. (St. Pl. 256-'7; 1 Chit. Pl. 687.)

The practical inconvenience of insisting thus rigorously upon a singleness of issue, and consequently a singleness of allegation, even with the qualifications just mentioned, induced the legislature to interpose to modify the doctrine in respect to the *defendant*, at that stage of the altercation where he *answers the plaintiff's declaration*, but retaining the common law principle of singleness in all other instances. (St. Pl. 275.) The English statute (4 & 5 Anne, c. 16,) provides in substance, that it shall be lawful for any defendant in any action or suit, in any *court of record*, with the *leave of the court*, to plead as many several matters thereto as he shall think necessary for his defence. (3 Bl. Com. 308; St. Pl. 272, &c.; 1 Chit. Pl. 593.) This statute required a rule or order of court in order thus to plead several matters, and the leave of the court was not accorded where the several proposed defences were *plainly* repugnant, the one to the other, such as *non assumpsit* or *non est factum*, and tender; nor where the pleas were of a *dilatory* character, as to the jurisdiction of the court, or in abatement; nor did the statute permit a defendant to demur and plead to the declaration at the same time. (1 Chit. Pl. 593 & seq, 260; Bac. Abr. Pleas, (K), 1, 3; St. Pl. 275-'6 & seq, 279.)

The Virginia statute allows an increased latitude in all these particulars, providing that "the *defendant* in any action may *plead* as many several matters, whether of *law or fact*, as he shall think necessary." (V. C. 1873, c 167, § 24.) No previous leave of court is required, and, therefore, the defendant is at liberty, if he is so minded, to present pleas ever so repugnant the one to the other; he may also plead and demur at the same time to the declaration; (Stone v. Patterson, 6 Call. 71; Syme v. Griffin, 4 H. & M. 277, 278; Waller v. Ellis, 2 Munf. 97, 101, 104; Bassett v. Cunningham, 7 Leigh, 407, 409-'10; Maggort v. Harnsberger, 8 Leigh, 532, 535; 5 Rob. Pr. 356); and it seems that the defendant may plead *in abatement* and *in bar* at the same time under this statute (that is, supposing the plea in abatement to be offered in time), and having pleaded in abatement, he may afterwards add a plea in bar within a reasonable period, (James Riv. & K. Co. v. Robinson, 6 Grat. 440; Allen v. Hart, 18 Grat. 729.) From these propositions it would seem to be inferable that two or more dilatory pleas might be pleaded at the same time,

although, as we have seen, it was not permitted under the English statute.

As no previous leave of court is required with us, in order to present a second or subsequent plea, so it is not necessary to aver that it is pleaded *by leave of the court*, nor is it needful to vouch the statute therefor, as that the plea is pleaded *according to the form of the statute*, which indeed, in Virginia, is expressly, however needlessly declared. (V. C. 1873, c. 167, § 30.)

2^s. No *Formal Defence* is required in a Plea.

The statute declares that a plea *shall commence* as follows: "The defendant says that," &c., (V. C. 1873, c. 167, § 29.)

What is called the *formal defence* is a phrase with which it is customary at common law to begin all pleas, and which runs thus, "The defendant comes and defends the wrong and injury when and where it behooves him, and the damages, and whatsoever else he ought to defend, and says," &c. This phrase had come to be purely formal and meant *nothing*, and is, therefore, wisely directed to be omitted both by the English rules of court, and by our own statute as above. (1 Chit. Pl. 462.)

3^s. Mode of Introducing a *second or subsequent Plea*.

It shall not be necessary to state in a second or other plea, that it is pleaded *by leave of court*, or according to the *form of the statute*, or to the like effect. (V. C. 1873, c. 167, § 30.)

4^s. Use of the phrases "*Actionem non*," "*Precludi non*," and of the *Prayer of Judgment*.

In a plea, replication or subsequent pleading, intended to be pleaded *in bar*, or *in maintenance* of the action (that is of the *whole action*), it shall not be necessary to use any allegation of "*actionem non*," "*precludi non*," or to the like effect, or any "*prayer of judgment*." (V. C. 1873, c. 167, § 25.)

At common law, pleas introducing *new matter*, begin by saying that the defendant says that, "the plaintiff ought not to have or maintain his action aforesaid, thereof against him," which is the phrase known as the "*actionem non*." (1 Chit. Pl. 587.) Its only use was to indicate whether the defendant meant to answer the *whole of the action*, or a *part of it merely*, by a special *plea in bar*. The omission of it, therefore, in a *plea in bar* to the *whole action* is productive of no confusion; for the absence of the *formula* as clearly demonstrates the character of the plea as its peculiar phraseology formerly did. So in the replication, at common law,

the plaintiff begins by saying that by reason of anything in the defendant's plea alleged, he *ought not to be barred*,—*precludi non*, (1 Chit. Pl. 633-'4); which was also employed, as the language itself imports, only where the plaintiff undertook to maintain his *whole action*. When, therefore, the replication maintains the *whole action*, the absence of the *formula* as much manifests its character as its language could do.

From the foregoing statement it appears that if the plea is not a *plea in bar* to the *whole action*, the *actionem non* is still proper to designate how much of the action it proposes to answer. Also if the replication does not propose to *maintain* the *whole action*, the *precludi non* must still be employed, in order to make it clear *how much of the action* it does propose to maintain. (St. Pl. (Ed. 1845,) 103 and 406.)

5^s. Doctrine touching *Protestation*.

When a pleader, in response to his adversary, fails to deny some of the allegations contained in the adversary's pleading, it is a rule of the common law that he shall be understood to admit the truth of the same, not only in that action, but for *all purposes whatsoever*. (1 Chit. Pl. 649-'50.)

That he should be understood to admit such allegations for the purposes *of that action*, is an inevitable consequence of the rule which requires *singleness* of averment; but there seems to have been no sufficient reason to hold it an admission of the allegations *for all purposes*.

In order to obviate this inconvenient consequence, pleaders were accustomed to resort to what is called a *protestation*, whereby the party using it, *protesting* that the allegations not denied are not true, proceeds to contest those upon the denial of which he designs to rest the cause. This, in the scholastic jargon of the times, was denominated the "*exclusion of a conclusion*." Its effect was to prevent the pleader who used it from being compromised by the implied admission of the allegations not denied, *in any future controversy*, provided *he succeeded in the issue* joined in the case in which the protestation occurred. But if he failed in maintaining that issue the protestation availed nothing! (1 Chit. Pl. 650; St. Pl. 218, n (21); Bac. Abr. Pleas, &c., (G), p. 532; 3 Th. Co. Lit. 434, & n (O. 1).)

Our statutes, following the rules of court of Hilary Term, 1834, have sought to do away with this formality, by providing that "no party *shall be prejudiced* by omitting a protestation in any pleading." V.C. 1873, c.

167, § 26; Philips' Case, 19 Grat. 510; 1 Chit. Pl. 649.)

It is plain that both the common law expedient of protestation, and the statutory enactment, alike fail to meet the precise point to be provided for. The common law doctrine itself, which leads to the use of the protestation, ought to have been repealed, and the statute should have provided that no pleader should be prejudiced *in a subsequent suit*, by failing to deny an allegation which the rules of pleading did not permit him to deny.

6^s. Conclusion of a Special Traverse.

A *special traverse* is a peculiar mode of pleading which will be explained in the sequel. At present it must suffice to say, that inasmuch as it adduced *new matter*, it concluded at common law, *not by tendering an issue*, as a plea by way of traverse commonly did, but *by offering to verify or prove* the new matter alleged, thus postponing the issue *one stage* of the altercation.

This fact, combined with other considerations, brought about a general disuse of the special traverse; and with a view to restore and encourage its employment, the rules of court of Hilary Term, 1834, and our own statute, in imitation thereof, provide that all special traverses, or traverses with an inducement of affirmative matter, *shall conclude to the country*, that is with a tender of issue; but this is not to preclude the opposite party from pleading over to the inducement when the traverse is not material. (V. C. 1873, c. 167, § 27)

7^s. Provision to Dispense with a *Similiter*, or Joinder in Demurrer.

When the plaintiff takes issue on the defendant's pleading, or traverses the same, or demurs so that the defendant is not let in to allege any new matter, the plaintiff may, without giving any rule to rejoin, proceed as if there were a *similiter*, or *joinder in demurrer*. (V. C. 1873, c. 167, § 28; Southside R. R. Co. v. Daniel, 20 Grat. 344.)

The object of this provision is to prevent merely formal delays in the maturing of causes. Independently of it, at common law, when the plaintiff filed a replication traversing the defendant's plea, the defendant was allowed until the next rules to accept the issue which the plaintiff tendered, and if, meanwhile, the term of court occurred, the cause not being ready to go on the docket, of course stood over until another term, thereby occasioning needless delay, (Nadenbousch v. McRae, Gilm. 228; Miller v. McLuer, Id. 339); but under this provision of the statute, when the defendant can do nothing else but accept

the issue tendered, the plaintiff may cause the suit to be put upon the docket as if the issue had actually been joined by the entry of a *similiter* on the part of the defendant. And so in the case of a *joinder in demurrer*. Thus a term is sometimes saved.

An enactment looking in the same direction, that is tending to prevent delay, has been already mentioned (*Ante*, p. 600), that which makes it the *duty of the clerk*, in any action where, for want of a plea, an office judgment would have been entered, whether a plea shall have been filed or not, to place the action *upon the court docket*, leaving the pleadings, if need be, to be *matured in court*.

8°. The Form of the Defence.

In *form*, the defence consists either of an objection to the legal sufficiency of the declaration, or it proposes to state some matter of fact which shows that the action cannot be maintained. In the first case the defendant is said *to demur* to the declaration; in the second, he is said *to plead* thereto;

W. C.

1°. Demurrer.

When the pleader, on the part of the defendant, conceives that the declaration of the plaintiff sets forth either no lawful cause of action at all, or sets it forth with too little certainty or formality, he may, if he thinks fit, object thereto for that reason. He is then said to *demur*, that is to *tarry or wait* thereon (*demorari*, or Fr. *demorer*), until the court shall adjudge whether by the law of the land the defendant is bound to answer the same. It is obvious, therefore, that a demurrer can never be founded on matter collateral to the pleading which it opposes, but must always be for matter apparent on the face of the statement itself. (St Pl. 63.)

See St. Pl. 44, 139; Id. (Tyler's ed.) 82, 157; 3 Bl. Com. 314 & seq;

W. C.

1°. The Form of the Demurrer.

A demurrer in point of form, either avers simply that the adversary's pleading, say the declaration, is *not sufficient in law*, in which case it is known as a *general demurrer*; or it adds to that general averment a *specification* of the errors imputed to the pleading demurred to, when it is denominated a *special demurrer*.

W. C.

1^h. The Form of General Demurrer.

A demurrer is in effect an objection to the sufficiency of the adverse pleading, either on the ground that the

case shown by the opposite party is essentially bad, or at least is inartificially stated, so that the party demurring proposes, as we have seen, to *wait or stay* without giving any present answer to the pleading in question. (St. Pl. 44, 139-'40; Id. (Tyler's ed.) 82,157.) And such inartificiality of statement may be in a matter material to the merits, or in some particular of mere form.

At common law the objection, though it consist of matter of form only, is not required to be stated in the demurrer, save in the single case where the error consists in *duplicité of allegation* (1 Chit. Pl. 701), so that, upon a mere general averment that a pleading is "*not sufficient in law*," the common law leaves a party at liberty to take advantage of any defect, however trifling; thus delaying, and often frustrating justice, and cherishing in the profession a carping, syllable-catching disposition, not congenial to the great purposes of jurisprudence. A demurrer couched in those general terms, without specifying the faults intended to be insisted upon, is called a "*general demurrer*," and to cure the evil of allowing a general demurrer in the case of such trivial objections, several statutes were at different times enacted. The first was the statute 27 Eliz. c. 5, which directed that the judges should proceed to give judgment according to the *very right of the cause*, without regarding any defect, imperfection, or *want of form* in the pleadings, except those only which the party demurring shall *especially set down and express* together with his demurrer. The judges, however, seem not to have been sufficiently liberalized at that time to give full effect to this judicious legislation, and raised such difficulties in the construction of the statute as to make it necessary to supplement the enactment of 27 Eliz. by 4 and 5 Anne, c. 16. That statute provides, that the judges on demurrer shall regard no defect, imperfection, or want of form in the pleadings, except those *especially set down* in the demurrer as causes thereof, so as sufficient matter appear in the pleadings, upon which the judges may give judgment *according to the very right of the cause*. This statute, though little plainer or more peremptory in its terms than 27 Eliz., yet because the judges were better prepared for it, produced the desired effect, and thus these two statutes of 27 Eliz. and 4 and 5 Anne gave rise to the distinction between *general demurrers*, which are resorted to where the objections to the pleadings are of a *substantial and material* nature, and *special demurrers*, which were intended to be employed where the imperfection was one

of *form only*, in which case the grounds of the demurrer must be *specially set forth* in the demurrer itself, or else will not be noticed; so that the only difference in point of *form* between the two is that the special demurrer has appended to it an enumeration of the imperfections intended to be objected to.

2^a. Form of Special Demurrer.

Previous to 1850, the legislation of Virginia had placed the doctrine of general and special demurrers on identically the same footing as in England, so that our courts were prohibited to regard on the demurrer, any imperfection or defect not *specially alleged* as cause thereof, unless some thing were omitted so essential to the action or defence as that judgment, *according to law and the very right of the case, could not be given*.

The Code of 1849, however, introduced a new policy, it would seem, of very questionable expediency, namely, not to admit formal errors, of the class just described, *to be taken advantage of at all*; thus, in effect, *abolishing* special demurrers. The enactment is as follows: "On a demurrer (unless it be to a *plea in abatement*) the court shall not regard any defect or imperfection in the declaration or pleadings, whether it has heretofore been deemed mispleading, or insufficient pleading, or not, unless there be omitted something so essential to the action or defence that judgment, *according to law and the very right of the cause, cannot be given*." (V. C. 1873, c. 167, § 32.) And it is added that no demurrer shall be sustained because of the omission in any pleading of the words, "This he is ready to verify," or "This he is ready to verify by the record," or "As appears by the record;" but the opposite party may be excused from replying, demurring to, or otherwise answering any pleading which ought to have, but has not, such words therein until they be inserted, (V. C. 1873, c. 167, 32); a provision which of itself operates as a statutory or legislative demurrer in the cases embraced in it! We have thus the singular anomaly of the legislature itself propounding a demurrer without the agency of the party, in several instances of the most *immaterial informality*, whilst in all other cases the courts are denied the means of compelling pleaders to *employ the accustomed forms of allegation*, notwithstanding serious difficulties and inconveniences will arise from their habitual non-observance. For it is the remark of a learned judge, that an unnecessary departure from precedent, whether it spring from the love of change, or be the result of ignorance or negligence

on the part of the pleader, can only lead to useless litigation, delay, and expense. (3 Denio, (N. Y.) 245.)

To prune away redundancies of allegation, to abolish the inventions of pedantic "nicety and curiosity," to restore to its primitive simplicity that art of pleading which in its use, nature, and design, as Lord Hale remarks, was only to "*render the fact plain and intelligible, and to bring the matter to judgment with a convenient certainty*," (Hale's Hist. Com. Law, 212), is an object worthy the efforts of a wise legislation; but it may be doubted if the surest way to accomplish beneficially the desired result, is to discard those long-established and well-nigh perfect forms of expression, refined by the experience of five centuries, with which all practitioners of the law are, or ought to be, or may easily become familiar, and to indulge the inexperienced, the ignorant, and the presumptuous, in new forms of speech devised by themselves, with no other restriction than that they shall so state the case that "judgment according to law, and the very right of the cause," can be given. The legislature having judiciously excluded from the pleading all that is merely formal, and all that it is not needful to prove, it is surely not too rigorous to allow the courts, through the medium of a special demurrer, to require that the ancient forms, thus purged of all superfluities, should be adhered to, in the interest of the pleader himself, by obliging him to a simple, clear and certain statement of his case; in the interest of the opposing counsel and the judge, who else must often find themselves harassed and bewildered, not with grave juridical inquiries, but with doubts and embarrassments touching the precise meaning of ill-chosen words and badly constructed sentences; and in the interest of public justice, lest it be delayed and perverted by the unskilled dialectics of an incautious or ill-disciplined advocate.

The form of a demurrer at common law may be seen 3 Chit. Pl. 1245, &c. In Virginia, in imitation of the English rules of court of Hilary Term, 1834, this form has been abbreviated to the utmost possible extent. The statute declares that it shall be as follows, (V. C. 1873, c. 167, § 30):

FORM OF DEMURRER.

Circuit Court of A. County, to-wit:

— Rules, —

David Debtor,

ads.

Charles Creditor. }

The defendant comes and says that the said declaration is not sufficient in law.

B., p. d.

And the *joinder* is directed to be not less brief:

JOINDER IN DEMURRER.

Circuit Court of A. County, to-wit:

Rules, ———

Charles Creditor

vs.

David Debtor.

And the said plaintiff says that the said declaration is sufficient
B., p. q.

in law.

See Peyton v. Harman, 22 Grat. 643.

2^d. The Effect of a Demurrer; W. C.

See St. Pl. 143, 144; Bac. Abr. Pleas, (N) 3; Com. Dig. Pleader, (Q. 5), &c.; Id. (M. 1), (M. 2)

1^h. Doctrine at Common Law as to the Effect of a Demurrer; W. C.

1¹. A Demurrer admits *as true* all matters of fact which are *sufficiently pleaded*.

2¹. It obliges the Court to consider the *whole record*, and to give judgment for him who is on the whole entitled to it.

2^h. Doctrine by Statute in Virginia as to the Effect of a Demurrer.

The *defendant* is with us allowed to *plead* as many several matters, whether *of law or fact*, as he shall think necessary, (V. C. 1873, c. 167, § 24); and he may, consequently, *plead and demur* at the same time to the *declaration*. Of course, therefore, in this case, the demurrer does not admit for all purposes, the matters in the declaration which the plea denies. It will be observed, that this privilege belongs to the *defendant alone*, and to him only when he is *answering the declaration*. Hence, in the replication, the plaintiff cannot demur and plead at the same time; and if he demurs he admits the truth of the matter sufficiently stated in the plea. And so it is in all the subsequent stages of the altercation.

3^h. The Modern Practice in England, and in Virginia, in respect to Demurrer.

By the modern practice, which prevails both in England and with us, the demurrer, at whatsoever stage of the altercation it may occur, *may be withdrawn* by leave of the court, at any time before the judgment of the court upon it is finally and irrevocably entered, and the adversary's pleading may be answered in *point of fact*.

Of course the application to withdraw the demurrer must be made before the end of the term, at which the judgment adverse to the demurrant was entered; for after the end of the term, the judge has no power to alter the record.

4^h. The Considerations which determine the propriety of Demurring or of Waiving the Objections.

It is first to be considered whether the declaration or other adverse pleading is sufficient in substance and in form, to demand an answer. If sufficient in both, there is no course *but to plead*. On the other hand, if insufficient in either, there is *ground* for demurrer; but whether there should be a demurrer or not is a question of expediency to be determined upon the views following. If the pleading be insufficient in form merely, it may not be worth while to take the objection, considering that, unless it be such as to prevent the court from giving judgment according to law and the very right of the cause, it is not with us available upon demurrer; and considering also the indulgence allowed in the way of amendment; but it should be borne in mind that the objection (being one of *form only*), will be aided, as we shall see, by pleading over, or after pleading over, by the verdict, or lastly by the statute of jeofails and amendments. Supposing the pleader to choose to demur, and that the supposed insufficiency is one of *substance*, he is to consider whether the insufficiency be in the case itself, or in the manner of statement; for the latter might be removed by an amendment, and no material advantage be gained by demurring. And whether it be such as an amendment would remove or not, a further question will arise, whether it be not expedient to pass by the objection for the present, and plead over. This question, however, under the provisions of our statute of jeofails, could occur only where the pleading demurred to presents, not an imperfect case, but *no case at all*, in the way of demand or defence, &c. When that is the case it is better to contest with the adversary, in the first instance, by an issue in fact, and afterwards, if unsuccessful in that issue, urge the objection *in law*, by motion in arrest of judgment, or by writ of error. (St. Pl. 151-'2; Braxton v. Lipscomb, 2 Munf. 282; Buckner v. Blair, 2 Munf. 336; Green v. Dulaney, 2 Munf. 520; Mason v. Farmers Bank, 12 Leigh, 90; Ross v. Milne & ux, 12 Leigh, 217, 227.) And to this effect is Lord Coke's counsel, who in Lord Cromwell's case, 4 Co. 14 a, says: "Where the matter in fact will clearly serve for your client, although your opinion is that the plaintiff has no cause of action, yet take heed you do not hazard the matter upon a demurrer; in which, upon the pleading and otherwise, more perhaps will arise than you thought of; but first take advantage of the matters of

fact, and leave matters in law, which always arise upon the matters in fact *ad ultimum*, and never at first demur in law, when after trial of matters in fact, the matters in law will be saved to you." (Com. Dig. Pleader, (C. 2).)

The additional delay and expense of a trial of an issue in fact may also sometimes be a material reason for proceeding by demurrer, and not waiting to move in arrest of judgment, or to bring a writ of error. And Mr. Stephens suggests that a concurrent motive for adopting that course is that costs are not allowed upon a motion in arrest of judgment, nor upon a writ of error. (St. Pl. 152-'3.) With us it is otherwise as to costs, which are allowed to the *successful party*, as well on motion in arrest of judgment and on writ of error, as in other cases. (V. C. 1873, c. 181, § 8, 11.)

2^d. Defence by way of *Plea*.

We have already seen, that when the defendant comes to make his answer to the plaintiff's declaration, he must either object by way of *demurrer* to the sufficiency thereof, or must answer the same in point of fact, by way of *plea*. (St. Pl. 46, 153; Id. (Tyler's Ed.) 83.)

Pleas are divided into pleas *dilatory*, and pleas *peremptory*; dilatory pleas being such as do not affect to answer the action *upon its merits*, but to defeat it in the shape in which it is brought, upon the ground that the court has no local jurisdiction, or that all the parties have not been convened, or that there is some variance between the writ and the declaration, and the like; whilst *peremptory* pleas are such as meet the demand *upon its merits*, and purport to show matter intended to defeat the action finally and forever.

Dilatory pleas again are subject to a subordinate division. They are either, (1), To the *jurisdiction of the court*; (2), In *suspension of the action*; or (3), In *abatement of the writ, or declaration, or both*;

W. C.

1st. Dilatory Pleas.

The doctrine touching dilatory pleas may be set forth under the following heads, (1), The stage of the altercation at which a dilatory plea must be pleaded; (2), The *prima facie* verification of a dilatory plea required by law; and (3), The several sorts of dilatory pleas.

See St. Pl. 46; Id. (Tyler's Ed.) 83; 1 Chit. Pl. 475 & seq; Bac. Abr. Pleas, (E) 2; Id. Abatement; Com. Dig. Abatement;

W. C.

1^b. The Stage of the Altercation at which a *Dilatory Plea must be pleaded*.

A dilatory plea, not going to the merits of the action, must be pleaded always *before an office judgment*; and if it be a plea to the jurisdiction of the court, it must come before a rule to plead, or a plea in bar, or a demurrer, that is, at the *same rules at which the declaration is filed*. (V. C. 1873, c. 167, § 20, 46; Bradley v. Welch, 1 Munf. 284; Monroe v. Redman, 2 Munf. 240; 5 Rob. Pr. 14; Washington, &c., Tel. Co. v. Hobson & al, 15 Grat. 132.)

Some qualifications must be allowed, as we have seen, in the case of a dilatory plea, the matter of which has arisen since the last continuance, *puis darrein continuance*.

2^b. The *Prima Facie* Verification of a Dilatory Plea, Required by Law.

All pleas in *abatement* (that is, *all dilatory pleas*), must be verified *by affidavit*, in order that they *may be filed* (V. C. 1873, c. 167, § 38, 41; 5 Rob. Pr. 114-'15.)

It should be observed, that there are two other pleas also required to be verified by affidavit before they can be filed, namely, the plea of *non est factum* (V. C. 1873, c. 167, § 38), and a plea *in the nature of a plea of set-off*, (V. C. 1873, c. 168, § 5.) And it may be further mentioned in this connection, that a pleading controverting *hand-writing*, which is alleged in pleading, or denying a *partnership* which is alleged in pleading, or an *act of incorporation*, must also be verified by affidavit, in order to oblige the adversary to prove the hand-writing, the partnership, or the act of incorporation respectively. (V. C. 1873, c. 167, § 39, 40.)

The student must not fail to observe, that the affidavit in the first three, or indeed in all of these cases, in no wise assists in proving the truth of the plea; its sole effect is to warrant the court in receiving it.

3^b. The Several Sorts of Dilatory Pleas.

The several sorts of dilatory pleas are, (1), A plea to the jurisdiction of the court; (2), A plea in suspension of the action; and (3), A plea in abatement; W. C.

1^a. A Plea to the *Jurisdiction*.

A plea to the jurisdiction is one by which the defendant denies the jurisdiction of the court to entertain the action. The lines of demarcation between the several courts with us are so distinct as well nigh

to preclude the possibility of mistake, except only in respect to the *territorial extent* of their authority. Pleas to the jurisdiction in Virginia always in practice grow out of a party's being sued in one county or corporation when the action should have been brought in another. (St. Pl. 49; Id. (Tyler's ed.) 84; V. C. 1873, c. 167, § 20.) The form of a plea to the jurisdiction, as it occurs amongst us, is as follows. (3 Chit. Pl. 894; 5 Rob. Pr. 23 & seq.):

PLEA TO THE JURISDICTION OF THE COURT.

<i>Title of Court.</i>	Circuit Court of A. County, to wit:	
<i>Rules.</i>	—— Rules. ——	
<i>In proper person.</i>	David Debtor ads.	And the said defendant, in his own proper person, comes and says, that this court
<i>Denial of cognisance.</i>	Charles Creditor.	ought not to have or take any further cognizance of the action aforesaid of the said plaintiff, because he
<i>Statement of defence.</i>		says that before and at the time of issuing the writ in this cause, the said defendant did not reside in the said county of A., but did then reside, has ever since resided, and does now reside, in the county of N., and that the cause of the action aforesaid (if any such there were), did not, nor did any part thereof, arise within the said county of A.; but that such cause of action, and every part thereof, did arise in the said county of N. And this the said defendant
<i>Conclusion.</i>		is ready to verify. Wherefore he prays judgment, whether this court can or will take any further cognizance of the action aforesaid.
<i>Offer to verify.</i>		B., p. d.
<i>Prayer of judgment.</i>		

Let it be observed, that this, as well as every other dilatory plea, must be *verified by affidavit* before it can be filed. (V. C. 1873, c. 167, § 38.) The student must also continually bear in mind, that no dilatory plea can be filed to *set aside an office judgment*, because it is not a *plea to issue*. (V. C. 1873, c. 167, § 43-46.) Hence the defendant can avail himself of this class of defences, as we have already seen, at *rules only*, and before a judgment is entered; nay, it will be remembered, that a *plea to the jurisdiction* must be put in at the same rules at which the declaration is filed. (V. C. 1873, c. 167, § 20; see *Bradley v. Welsh*, 1 Munf. 284; *Monroe v. Redman*, 2 Munf. 240; *Middleton v. Pinnell*, 2 Grat. 202; *Warren v. Saunders*, 27 Grat. 265, 267; *Wash. & N. O. Tel. Co. v. Hobson & als*, 15 Grat. 122, 132; 5 Rob. Pr. 114-115.)

2^d. Plea in *Suspension of the Action*.

It is believed that the only instance of a plea in suspension of the action in Virginia, at present, is that the plaintiff, since the contract was made, has

become an *alien-enemy*. This fact disables him from prosecuting any suit during the pendency of hostilities, and is, therefore, a proper subject of the plea for a suspension of the action. (St. Pl. 47, and App'x xxviii, n (21); Id. (Tyler's Ed.) 84; Bac. Abr. Alien, (E); 5 Rob. Pr. 31-'2; 1 Do. (2nd ed.) 298; Hutchinson v. Brock, 11 Mass. 124.)

It is *said* to be also the subject of such a plea that the plaintiff has agreed not to sue for a time, as yet unexpired. (5 Rob. Pr. 38; Pearl v. Wells, 6 Wend. 294; Wilkinson v. Bryan, 1 Ad. & Ed. (28 E. C. L.) 112.) But *contra*, and more consistently with reason and analogy, see Bac. Abr. Release, (A) 2; Emes v. Widdowson, 4 Carr. & P. (19 E. C. L.) 251; Simpson v. Rockham, 7 Bingh. (20 E. C. L.) 617; Place v. Potts, 8 Welsby, H. & Gord. 715. The proper remedy on such stipulation is supposed to be an action for its breach, or an application to the *equitable power* of the court, and not by way of plea. And it is *said* also to be a proper subject for such a plea, that the plaintiff has been *outlawed*, (5 Rob. Pr. 30; 3 Th. Co. Lit. 380-'82; Gilb. Com. Pleas, 202); but this latter proposition is in *Virginia* certainly erroneous, it being declared by statute, that outlawry shall not affect one's *civil rights*, any more than conviction of the offence charged would do. (V. C. 1873, c. 201, § 28.) Nor is nonage any longer the ground of such a plea, it being provided that the proceedings in a suit shall *not be stayed* because of the infancy of a party, but a guardian *ad litem* is to be appointed. (V. C. 1873, c. 167, § 17.)

3^d. Plea in Abatement.

A plea in abatement is one which shows some ground for abating or quashing the original writ, or declaration, or both. Such pleas are of *two sorts*, (1), To the *disability of the person* to sue or be sued; and (2), To the *declaration*. (St. Pl. 47; Id. (Tyler's Ed.) 85; 5 Rob. Pr. 36, 49, &c., 55, &c., 53, &c., 103, &c); W. C.

1st. Plea in Abatement for *Disability of the Person* to Sue or be Sued.

In England such disability may arise from various causes, as in case of the plaintiff, from attainder of treason or felony, outlawry, coverture, and some others; and in case of defendant from coverture and infancy. (1 Chit. Pl. 482-'3.) It is apprehended, that with us *coverture* alone is ground for such a plea.

The following is the form of a plea in abatement on account of the defendant's *coverture*, which, it will be observed, must have occurred since the contract was made; for if it existed at the time the contract was entered into, the contract was thereby wholly *avoided*, and *coverture*, therefore, in such case is not a plea *in abatement*, but *in bar*. (1 Chit. Pl. 484, 511, 519.)

Plea in Abatement for Coverture of the Defendant.

3 Chit. Pl. 899; 5 Rob. Pr. 53.

Title of Court. Circuit Court of A. County, to wit:

Rules. ——— *Rules* ———

Dolly Debtor, sued by the
name of Dolly Spinster,
ada.

And the said defendant in this suit,
to wit Dolly Debtor, who is sued
by the name of Dolly Spinster, *in*
her own proper person, comes and

In proper person. Charles Creditor.

prays judgment of the said writ

*Statement of
defence.*

and declaration of the said plaintiff, because she says that at the
time of the issuing of the said writ of the said plaintiff, she was
and still is married to, and the lawful wife of one Daniel Debtor,
who is still living, to wit at the county aforesaid, and this she is

Conclusion.

ready to verify. Wherefore, because the said Daniel is not named

Offer to verify.

in the said writ and declaration, she prays judgment of the said
writ and declaration, and that the same may be quashed.

Prayer of

Judgment.

B. p. d.

Virginia:

A. County, to wit:

This day the within-named Dolly Debtor appeared before me, a
justice of the peace in and for the county aforesaid, and made oath
that the matters and things stated in the annexed plea are true.
Given under my hand this ——— day of ———, in the year of our
Lord, 187—. J. P.

2*. *Plea in Abatement to the Declaration.*

The ground of such a plea may be either, (1), A
variance between the writ and the declaration; or
(2), Some defect in the declaration, which being sup-
posed to be transferred from the original writ, is
spoken of as applicable *to the writ*;

W. C.

1¹. *Plea in Abatement for a Variance between the
Writ and the Declaration.*

This will best be illustrated by a form.

Plea in Abatement for Variance between Writ and Declaration.

1 Wentworth's Pl. 8.

Title of Court. Circuit Court of A. county, to wit :*Rules.*

Rules, ———

In proper person. David Debtor
ada.Charles Creditor.
words, to wit :

And the said defendant in his own proper person, comes and craves oyer of the writ in this cause, and it is read to him in these

[*Here insert the writ verbatim.*]*Statement of Defence.*
Variance.

which being read and heard, the said defendant prays judgment of the said writ and declaration, and pleads that there is a variance between the said writ and the said declaration thereupon in this particular ; that is to say, for that in the said writ it is said :

[*Insert the material part of the writ as to which the variance exists.*]

and in the declaration aforesaid, founded on the said writ, it is complained,

[*Insert so much of the declaration as involves the supposed variance.*]*Conclusion.*
*Prayer of Judgment.*Therefore, because there is a manifest variance between the writ aforesaid and the said declaration, the said defendant prays judgment of the writ and declaration aforesaid, and that the same may be quashed.
B., p. d.*Append affidavit as before.*

As to a variance between the writ and declaration in respect of damages claimed and the identity of parties, see *Dabneys v. Knapp & als*, 2 Grat. 354 ; 5 Rob. Pr. 43 & seq.

The student will remember that whilst at common law such a variance between the writ and declaration might have been taken advantage of, if it were immaterial, by a plea in abatement or special demurrer, and if material, by those means, and also by general demurrer, (after oyer of the writ), motion in arrest of judgment, or writ of error, (*Redman v. Edolph*, 1 Saund. 318, n (8); *Norton v. Palmer*, 1 Cro. (Eliz.) 829); yet in Virginia, by statute, it can be done by means of a *plea in abatement* alone. (V. C. 1873, c. 167, § 19.)

2¹. *Plea in Abatement for Defect in the Declaration.*

Such defect being supposed to be transmitted from the original writ, is sometimes spoken of as a plea to the writ, but in fact it is applicable to the declaration.

W. C.

1^m. Plea in Abatement *for matter apparent on the face* of the Writ and Declaration.

e. g. repugnancy, want of sufficient time, or too great time between the *teste* of the writ, and the return-day thereof; as for instance, that the writ is not returnable *within ninety days* from its date. (1 Chit. Pl. 485; V. C. 1873, c. 166, § 2.)

These defects thus appearing on the face of the declaration, although some of them may possibly exist with us, are yet so rare as to make it needless to furnish a plea in abatement on account of them.

2^m. Plea in Abatement for matter *dehors* (that is, *outside*) the writ.

Of this kind of plea it is proposed to advert to but two, namely, for *misnomer*, and *non-joinder of a co-contractor*.

W. C.

1^a. Plea in Abatement for *Misnomer* of Plaintiff or Defendant.

At common law the *misnomer* of plaintiff or defendant makes the writ and declaration abatable, whether the misnomer be in the christian or surname. Mistakes which amount to a misnomer or otherwise are stated in the books. (1 Chit. Pl. 279; Lindsay v. Wells, 3 Bingh. N. C. (22 E. C. L), 777; Rust v. Kennedy, 4 Mees. & Welsb. 586; Taylor's Case, 20 Grat. 825.)

In Virginia, however, by statute, (taken from 3 & 4 Wm. IV, c. 42, § 11), no plea in abatement for this cause is allowed *in any action*; but instead of it, the declaration, on *defendant's motion*, and on affidavit of the right name, is *amended* by inserting the right name. (V. C. 1873, c. 167, § 18; St. Pl. (Ed. 1845). App'x xxix, n (23); 5 Rob. Pr. 92 & seq.)

2^a. Plea in Abatement for *Non-joinder of Co-Contractors*.

Non-joinder of a co-contractor as a defendant, is a ground of abating the writ, or declaration, or both, because, of the obvious propriety of causing contracts jointly made to be enforced *jointly and not separately*, if either of the contracting parties who may be sued separately shall demand it at a sufficiently early stage of the proceedings. (1 Chit. Pl. 47, 52.) But the plea having been sometimes abused to the hindrance needlessly, of jus-

tice, (as where the party pretermitted was abroad, or his residence unknown to the plaintiff), it is now provided by statute in Virginia, adopted from the English statute before referred to, of 3 & 4 Wm. IV, c. 42, § 11, that such pleas shall not be allowed unless it shall be stated that the person omitted *is resident within the jurisdiction* of the court; and unless also *the place of his residence* be stated with convenient certainty (that is, the county or corporation wherein he resides), in an affidavit verifying the plea. (V. C. 1873, c. 167, § 21.) And in pursuance of the same policy, it is declared that if, upon the trial of the issue joined on such plea, it appear that the action could not be maintained against the parties omitted, or any of them, by reason of the statute touching *parol agreements*, (V. C. 1873, c. 140), or of the statute of *limitations*, (V. C. 1873, c. 146), the issue is to be found *against the defendant*. (V. C. 1873, c. 167, § 22.)

By another provision of the statute, the plaintiff is permitted *to amend* his declaration, by introducing as additional defendants, the persons named in such plea; and if, upon serving process upon them, it appear by the subsequent pleadings, or at the trial, that the original defendants are liable, but that one or more of the new parties brought in upon the suggestion in the plea are not liable, the plaintiff is to have judgment against such of the defendants as appear to be liable; and such as are not shall recover costs against the plaintiff, who, however, is to be allowed the same against the original defendants whose plea occasioned the difficulty. (V. C. 1873, c. 167, § 23.)

The following is a plea in abatement for *non-joinder* under our statute. Its almost entire identity with the form in Steph. Pl. 48; Id. (Tyler's Ed.) 87, will not escape the student's attention.

Plea in Abatement for Non-Joinder of a Co-Contractor.

Title of Court. Circuit court of A. county, to wit :

Rules.

— Rules, —

David Debtor

vs.

Charles Creditor.

And the said defendant, by his attorney, comes and prays judgment of the said declaration, because he says that the said

Statement of Defence. several promises and undertakings in the said declaration mentioned, (if any such were made), were made jointly with one Charles Contractor, who is still living, and at the commencement of this suit was, and still is, resident within the jurisdiction of this court, to wit, in the county of N., and not by the said defendant alone, and this the said defendant is ready to verify. Wherefore, forasmuch as the said Charles Contractor is not named in the said declaration together with the said defendant, the said defendant prays judgment of the said declaration, and that the same may be quashed.

R., p. d.

Affidavit annexed, as *Ante*, p. 628.

The student is desired to observe particularly, that in all these instances of *dilatory pleas* the plea has always afforded the means of *correcting the mistake* imputed by it. Thus the plea to the jurisdiction not only averred that the defendant was not a resident of the county in which he was sued, but proceeded to state in *what county he was resident*, and also that the cause of action arose not in that county, but in some other, naming it; the plea alleging the coverture of the female defendant gave the *name of her husband*; the plea averring the omission of a co-contractor *stated his name*. In all these cases, therefore, the plaintiff is guarded against the possibility of falling subsequently into any error of the same sort. This is in pursuance of a general rule applicable to *all dilatory pleas*, namely, that every such plea shall give the plaintiff a *better writ*. (Steph. Pl. 431; Id. (Tyler,) 377; 5 Rob. Pr. 104; Warren v. Saunders, 27 Grat. 265, 267.)

2^d. Peremptory Pleas.

The doctrine touching peremptory pleas may be embraced under the two heads of, (1), The nature of peremptory pleas; and (2), The several parts of such a plea;

W. C.

1^h. The Nature of Peremptory Pleas.

A peremptory plea, as has been already explained, is a plea to the *substantial merits* of the action, purporting to show that it can, under no circumstances, be maintained. Such a plea is known by various designations, such as a plea *to the action*; a plea *to the merits*; a plea *in bar*; a plea *to issue*; or an *issuable plea*; as well as a *peremptory plea*.

Peremptory pleas, in general, are either, (1), By way of *traverse*, or denial of the declaration; or (2), By way of *confession* of the plaintiff's allegations, and *avoidance thereof*, by the averment of new matter.

Indeed, all pleadings after the declaration (with some exceptions presently to be mentioned,) are either by way of *traverse*, or by way of *confession and avoidance*, as Mr. Stephen explains, (St. Pl. 52, 153; Id. (Tyler,) 89, 157.) The exceptions are, (1), The case of *dilatory pleas*; (2), Pleadings by way of *estoppel*; and (3), *New assignments*; (St. Pl. 219; Id. (Tyler,) 220;) the nature of all of which will be explained in due time;

W. C.

1¹. Pleas by way of *Traverse*.

Pleas by way of traverse (or *denial*) of the *declaration*, are of three kinds, viz: (1), Common traverse; (2), General traverse, more usually known as the *general issue*; and (3), Special traverse, or traverse with an *absque hoc*. (St. Pl. 153, &c.; Id. (Tyler,) 167, &c.)

At the subsequent stages of the altercation *after the plea*, the several traverses are the common traverse, the special traverse, and the traverse *de injuria*, explained by Mr. Stephen, (St. Pl. 163; Id. (Tyler,) 172.) The last is confined to the *replication*, (Ibid.; 1 Chit. Pl. 638;) as the general traverse, or general issue, is limited to the *plea*;

W. C.

1². The Common Traverse.

The common traverse is characterized by the denial's being couched *in the terms of the allegation traversed*, and not many instances of it occur *in pleas*. One is presented, however, by Mr. Stephen, (St. Pl. 52; Id. (Tyler,) 90;) where to a declaration on a lessee in covenant for not repairing, to an allegation that the windows of the tenement were "in every part thereof ruinous, in decay, and out of repair," (St. Pl. 37; Id. (Tyler,) 60,) the defendant pleads by way of traverse, that the windows of the tenement "were not in any part thereof ruinous, in decay, and out of repair."

2². The General Traverse, or *General Issue*.

The general traverse, or *general issue*, is a form of traverse which occurs only in the *plea*, and at no subsequent stage of the altercation. It denies the allegations of the plaintiff's *declaration in general terms*, and not *in terms of the allegation denied*. It appears to have been denominated the *general issue* because it involves the *whole declaration*, or at least the main substance of it, and is more *comprehensive* than the issue tendered by the *common traverse*. The

plaintiff is by the general issue put upon the proof of his whole case, which is merely the resultant of the general principle of evidence, that the burden of proof is *upon the affirmative*. (1 Greenl. Ev. § 74.) Hence, under the plea of *non est factum*, the plaintiff must *produce and prove* the deed declared on, (1 Sand. Pl. & Ev. 395, 422 & seq.); and under the pleas of *non assumpsit*, not guilty, and *nil debet*, the plaintiff must prove in substance all the material averments in the declaration, (1 Sand. Pl. & Ev. 140, 345, 410); and under the plea of *non detinet*, the plaintiff must prove the case he has stated, namely, his property in the goods, and the detainer by the defendant, with the value of the goods, and the damages sustained by reason of the detention. (1 Sand. Pl. & Ev. 435-'6. See also Bart. Law Pract. 141 & seq.)

In England, by the rules of court of Hilary Term, 4 Wm. IV, (A. D. 1834), a more limited effect was wisely allowed to these issues than prevailed at common law, and the *terms* of some of them were changed so as to make them correspond with the narrower effect they were designed to have, (St. Pl. (Ed. 1845), 156); and by further rules of court, in pursuance of an act of 1852, (15 and 16 Vict.), and by the act itself, a still greater degree of precision was exacted. (5 Rob. Pr. 347; 4 Do. 862.) These restrictions upon the *general issue*, though tending very wholesomely, to correct the excessive and inconvenient vagueness to which, in most instances, it is perverted, are unfortunately not adopted in Virginia. With us the general issues retain their ancient form and effect, (St. Pl. 162, n (20); Id. (Tyler's Ed.) 169 & seq). This would seem to be a subject of just regret, for several of those issues, (as especially the issue of *nil debet* in the action of *debt on simple contract*, and the issue of *non-assumpsit* in the action of *assumpsit*), are so very comprehensive as to admit of almost every conceivable defence being made under them, and, therefore, fail to subserve one chief purpose of pleading, namely, to acquaint the opponent with the facts intended to be relied on, so that both parties may come prepared fairly to meet and contest the opposing case of his adversary. However, the revisors of the Code of 1849, have provided that in any action the *court may require the particulars of the claim, or of the ground of defence* to be filed, (V. C. 1873, c. 172, § 49,) which

might in practice be often judiciously employed to define the subject of controversy.

Before setting forth *the forms* of the general issues, it will be expedient to anticipate a subsequent head, so far as to state the parts of which *every plea* consists, that is, at common law, with the statutory modifications. The parts are as follows, namely: (1), The *title of the court* and the *rules*; (2), The *names of the parties* in the margin; (3), The *commencement of the plea*; (4), The *actionem non*; (5), The *body of the plea*; and (6), The *conclusion*. (1 Chit Pl. 582 & seq.) Let us consider each of them.

1, The title of court and rules.

For the occasion and necessity of these, see notes to declaration, *Ante*, p. 568, 590.

2, Names of the parties *in the margin*.

The names of the parties do not strictly constitute a part of the plea. It is enough to insert the surnames only, and that of the defendant precedes the plaintiff's, and is followed by the letters "ads." (*ad sectam*), as "Johnson ads. Smith." The names must correspond of course with those in the declaration, save only that where defendant has occasion to plead by another name than that in the declaration, the diversity should be noted in the margin thus, "C. D., sued by the name of E. D. ads. A. B." See *Ante*, p. 568.

3, The commencement, which includes, (1), The name or designation of the defendant; (2), The appearance of the defendant; and (3), The defence; of each of which it is expedient to say somewhat.

(1), The name of the defendant, or more commonly the mere designation of him as "the said defendant."

No other observation seems here to be called for than that when the defendant is sued by a wrong name, and without objecting to the misnomer, wishes to defend in his right name, the plea should begin thus: "and C. D., against whom the said A. B. hath exhibited his bill by the name of E. D., comes, &c." (1 Chit. Pl. 583-4.)

(2), The appearance of defendant.

The appearance may be stated to have been either in person or by attorney; for a defendant is *at liberty* to appear and defend in person, if he is so minded. As a *feme covert* when *sued alone* is incapable of appointing an attorney, she should appear and defend in person; an *idiot*, it is said, should also appear in

person, whilst a *lunatic* should appear whilst under age by guardian, and when adult, by attorney, although in Virginia the statute seems to contemplate that all *insane* persons (which includes both idiots and lunatics) shall in all cases defend by guardian *ad litem*, (V. C. 1873, c. 167, § 17; Id. c. 15, § 9 (cl. 5).) An infant must appear by guardian *ad litem*, and not by attorney; and in a plea to the jurisdiction, the appearance must purport to be *in person*; for to appear by an attorney, who is a *quasi* officer of the court, would admit its cognizance. A corporation aggregate, which is incapable of a personal appearance, must purport to appear by attorney; and in a plea by husband and wife, the appearance is stated to be by attorney. In all other cases, the appearance is alleged to have been in person or by attorney, according to the fact. (1 Chit. Pl. 461-2; Id. 584-5.)

(3). The defence.

Defence (as here used), is defined to be the *denial of the truth or validity* of the complaint, and does not merely signify a justification. It is a general assertion that the plaintiff has no cause of action, which assertion is afterwards extended and maintained in the plea; and although clearly merely formal, and not at all tending to the development of the merits of the case, was yet formerly esteemed so essential that the omission of it was fatal to the plea,—the maxim being that “*pleas must be pleaded with defence.*” When verbal subtleties were more regarded than they have been for a century past, a distinction was taken between *half defence*, as it was styled, and *full defence*. The formula for *full defence* is: “The said defendant by his attorney comes and defends the wrong and injury when and where it behooves him and the damages, and whatsoever he ought to defend, and says;” and for *half defence* it is: “The said defendant, by his attorney, comes and defends the wrong and injury, and says.” And the difference in effect is, that the defendant, by undertaking to defend *when and where it behooves him*, acknowledges the jurisdiction of the court, and by defending the *damages* waives all pleas in abatement, results which do not follow from the use of “*half defence.*” From this paltry and senseless technicality, the pleaders took refuge in an ambiguity, expressing the defence thus: “And the said defendant, by his attorney, comes and defends the wrong and injury, *when, &c.*, and says,” which will be considered as only half defence, where

such defence should be made, and as full defence, when the latter is necessary. (1 Chit. Pl. 585, 462; St. Pl. 431, n (36); Id (Tyler's Ed.) 374; Bac. Abr. Pleas (D).)

This doctrine is wisely swept away in Virginia, by a statute taken from the rules of court of Hilary Term, 1834, which enacts that *no formal defence* shall be required in a plea; it shall commence as follows: "The defendant says that," (V. C. 1873, c. 167, § 29.)

(4), The *actionem non*.

The *actionem non*, or as it is customary to write it, the *actio. non*, is an allegation occurring immediately *after defence*; that the "plaintiff *ought not to have or maintain his action* aforesaid against the said defendant," for the reason contained in the substance or body of the plea. One purpose of it is to distinguish *pleas in bar*, which usually contain this formula, from *pleas in abatement*, to which it is unknown; and another to discriminate *how much* of the plaintiff's action it is designed to answer.

In a plea of the *general issue*, or other plea in bar to the whole declaration, which *merely denies* what is therein alleged, and does not introduce any *new matter*, it is not usual to insert the allegation; but special pleas *always begin with it* at common law. And it should be observed that its language refers to the *commencement of the action*, and not to the time of the plea. Hence, where the matter of the plea arises after the commencement of the suit, the *actio. non* is not applicable; but the matter should be specially pleaded, (and cannot be given in evidence under the general issue), *in bar of the further maintenance* of the action; or if it arise after issue joined on a previous plea, it must be pleaded *puis darrein continuance*. (1 Chit. Pl. 585; St. Pl. (Tyler's Ed.) 348-9; Id. (Ed. 1845), 401, 396, 403; Nichols v. Campbell, 10 Gratt. 560.)

It may be expedient to mention, that the *actio. non* is applicable only where the plea admits that the plaintiff had once a cause of action, which the plea seeks to avoid. If the plea deny that the plaintiff ever had a cause of action, as if to an action of debt on a bond, it alleges any taint of illegality which vitiates the instrument, such as usury, gaming, coverture of defendant, &c., it should not use the phrase of *actio. non*, but of *onerari non debet*,—that the defendant ought not to be charged. And in that case the plea should describe the writing sued on not as a

deed, but merely as a *writing*, or a "*supposed* writing obligatory." (1 Chit. Pl. 585-'6; Cabell v. Vaughan, 1 Saund. 290, n (3); Brown v. Cornish, 2 Salk. 516; S. C. 1 Ld. Raym. 217.)

But the *actio. non*, although not without some apparent utility, is upon the whole little more than an ancient form, and accordingly, its use has been much limited by statute, adopted from the rules of court of Hilary Term, 1834, whereby it is enacted, that in a plea intended to be pleaded *in bar of the action*, (that is, it is presumed, of the *whole action*), it shall not be necessary to use any allegation of "*actionem non*," or to the like effect, or "*any prayer of judgment*." (V. C. 1873, c. 167, § 25; St. Pl. (ed. 1845) 406.)

(5), The *body of the plea*, which may contain, (1), The inducement; (2), The protestation; (3), The ground, or substance of the defence; (4), The *quæ est eadem*; and (5), A traverse of the declaration, or of a material part thereof; of each of which in their order.

(1), The inducement.

The inducement is a statement in the nature of a preamble, setting forth *explanatory circumstances* calculated to make the main averments more intelligible. (1 Chit. Pl. 317-'18, 567.) The phrase, however, has a more definite signification in the case of a *special traverse*, presently to be mentioned. (*Post* p. 648; St. Pl. 169, 178; Id. (Tyler's Ed.) 184, 191.)

(2), The protestation.

The nature of the protestation has been already explained. *Ante*, p. 616, & seq; (1 Chit. Pl. 650; 1 St. Pl. 218, & n (n); Id. (Tyler's Ed.) 217.)

(3), The ground or substance of the defence. This, of course, is the *essence of the plea*. (1 Chit. Pl. 587-'8.)

(4), The *quæ est eadem*.

This is an allegation which, in actions of trespass particularly, where the plea sometimes necessarily states the injury to have been committed at some other time and place than that laid in the declaration, comes immediately before the conclusion, and avers that the wrong referred to in the plea is the *same* as that mentioned in the declaration. Of course it is needless, if the declaration and plea are conformable, the one to the other. (1 Chit. Pl. 588.)

(5), A *traverse of the declaration*, or of a material part thereof.

It can be hardly needful to remind the student, that no traverse is to be expected, save in those pleas which are *by way of traverse*. It could not occur in those which are *by way of confession and avoidance*.

(6), The *conclusion*.

The conclusion of the plea includes, (1), The tender of an issue; (2), The verification, or offer to verify; and (3), The prayer of judgment.

(1), The tender of an issue, or *conclusion to the country*.

This is proper when the plea traverses the declaration, or a material part of it; as for example, in case of a plea by way of *common traverse*, or of the *general issue*; and of course is never proper where the plea is by way of confession and avoidance. (1 Chit. Pl. 588; St. Pl. (Tyler's Ed.) 168, 227-'9; Id. (ed. 1845), 153 to 155, 230.)

(2), The *verification*, or offer to verify.

This is proper wherever the plea introduces *new matter*, which sometimes, but rarely, occurs in cases of traverse, but always happens in pleas by way of confession and avoidance. (1 Chit. Pl. 589-'90; St. Pl. (Tyler's Ed.) 230, 378; Id. (ed. 1845), 233, 433.)

(3), The *prayer of judgment*.

The prayer of judgment occurs where the plea *contains a verification*, and, therefore, is not found generally in a plea *by way of traverse*. It ought to correspond with, and be founded on, the commencement of the plea, and be the effect or result of the matters contained in the body of it. And, therefore, a plea answering the declaration *in part only* should conclude with a prayer of judgment as to so much as the plea relates to; and a plea of matter arising after the commencement of the suit, ought to be concluded with a prayer of judgment as to the *further maintenance* of the action. (1 Chit. Pl. 591; St. Pl. (Tyler's Ed.) 134, 344, 350; Id. (ed. 1845), 394, 404.)

In pursuance of the policy inaugurated by the rules of court of Hilary Term, 1834, and as part of the abolition of the *actio. non*, in the commencement of the plea whenever it is *in bar of the whole action*, our statutes dispense in similar cases with the prayer of judgment. The statute enacts, that in a plea intended to be pleaded *in bar of the (whole) action*, it shall not be necessary to use any allegation of *actionem non*, or *any prayer of judgment*. (V. C. 1873, c. 167, § 25.)

Summing up what has been said of the parts of a plea, the more *essential* divisions seem to consist of

1. The *title of the court*, and the *rules* ;
2. The *commencement* ; including especially, the *defence* ;
3. The *actionem non*, in pleas by way of confession and avoidance ;
4. The *body or substance* of the plea ; and
5. The *conclusion*, embracing :
 1. The tender of issue, or the verification ; and
 2. The prayer of judgment when there is a verification.

The *forms* of the *general issues* respectively, are as follows :

IN DEBT ON BOND.

Non est factum.

Title of Court, Circuit Court of A. County, to wit :

and Rules.

Rules, ———

*Commence-
ment.*

David Debtor
ads.

And the said defendant, by his attorney, comes
and says that the said supposed writing obliga-

Body of Plea.

Charles Creditor.

tory [or "*indenture*," or "*articles of agree-
ment*," as the case may be], in the said de-

Conclusion.

*Tender of
issue.*

claration mentioned is not his deed. And of this he puts himself on
the country.

B., p. d.

Affidavit :

Virginia :

V. C. 1873, c.
156, § 38.

A. County, to wit :

This day David Debtor appeared in person before me, a justice
of the peace in and for the county and State aforesaid, and made
oath that the matters and things stated in the foregoing plea are
true. Given under my hand this ——— day of ——— in the year
of our Lord, 187—. J. P.

Offer of defence omitted pursuant to V. C. 1873, c. 167, § 29.
Actio. non omitted pursuant to the general rule which dispenses
with it in pleas which answer the *whole declaration*. (1 Chit. Pl.
585 ; N. C. 1873, c. 167, § 25.)

Under this plea the defendant at the trial may show,
either that he *never executed* the writing, or that it
is *absolutely void* in law ; as (*e. g.*) for coverture or
lunacy ; or because since its execution and before the
commencement of the suit, it has been erased, or
altered fraudulently, or in a material part by the
opposing party in interest. But he cannot show un-
der it any matter which makes the deed simply *void-
able*, but not absolutely void ; as (*e. g.*) infancy, du-
ress, fraud in the consideration, or any statutory ille-
gality, such as gaming, &c. These must be the sub-

jects of *special pleas*. (St. Pl. 162 n (20); Id. (Tyler's ed.) 171-'2; V. C. 1873, c. 168, § 5.)

It may be observed in respect to the *affidavit* in those cases where, although the defendant executed the writing, yet it is notwithstanding alleged to be *absolutely void*, that the plea may, and should be in the form given above, and the circumstances on which the defendant relies may be stated in the affidavit; for no man ought to be required to swear to a *conclusion of law*. (Jackson v. Webster, 6 Munf. 462; Cleaton v. Chambliss, 6 Rand. 86.)

IN DEBT—ON SIMPLE CONTRACT.

Nil Debet.

Title of Court. Circuit Court of A. County, to wit :

and Rules. ——— *Rules,* ———

<i>Commencem't.</i>	David Debtor,	And the said defendant, by his attorney,
<i>Appearance.</i>	ads.	comes and says that he does not owe the
<i>Body of plea.</i>	Charles Creditor.	said sum of ——— dollars, or any part
		thereof, in manner and form as the said plaintiff hath above
<i>Conclusion.</i>	complained; and of this the said defendant puts himself upon the	
<i>Tender of issue.</i>	country.	

One has only to consider the terms of this plea to see how extensive it is. It alleges that the defendant *does not owe* the money claimed by the plaintiff, and that may be either because he never in fact made such a promise; or because, although the promise was in fact made, yet it is either void or voidable; or because by some matter *ex post facto*, the promise has been discharged or vacated; or because it has been performed. Hence, under the plea of *nil debet*, the defendant may prove at the trial, coverture when the promise was made, lunacy, duress, infancy, release, arbitrament, accord and satisfaction, payment, a want of consideration for the promise, failure or fraud in the consideration, and in short, anything which shows that there is *no existing debt due*. The statute of limitations, bankruptcy, and tender are believed to be the only defences which may not be proved under this plea, and they are excepted because they do not contest that the *debt is owing*, but insist only that *no action can be maintained* for it. (St. Pl. 162, n (20); Id. (Tyler's ed.) 73; Bac. Abr. Limitations, (F); 5 Rob. Pr. 249; Id. 921; 1 Chit. Pl. 517; 1 Saund.

283, n (2); 2 Do. 63, n (6); Chapple v. Durston, 1 Cr. & Jerv. 8, 9; Butcher v. Hixton, 4 Leigh, 527, 528 & seq.)

Such an issue is obviously unfit for a jury to try, and does not tend to develop the merits of the case, nor to give to the plaintiff the slightest information as to the character of the defence contemplated, so as to enable him to come prepared fairly to meet his adversary. It has in truth no other advantage than to save trouble and thought to lawyers, and to cover up the delinquencies of the incompetent. It does not meet the objection to say that the pleader cannot know, when he prepares the pleadings, *all the facts precisely as they will be proved*. It is not necessary that he should know *all the facts accurately* in order to answer with vastly more precision than he does by the plea of *nil debet*. Surely he can acquaint himself so far with the case as to discover whether the defendant made a valid promise or not, or whether the promise, being originally valid, has been performed, or been discharged by some subsequent matter, and may adapt his plea accordingly. Seeing that the case must be closely examined and analyzed before it can be decided, why not oblige the parties, or their counsel, to do it in advance of the trial, and upon that private sifting of the facts base definite averments, which will give notice of the defence designed to be made, which a jury can readily investigate and decide upon, and which will consume far less time of the court. It is no hardship upon defendants, or their counsel, to require that they shall understand the facts and the law of their causes before they present themselves for trial, and that they should, instead of the plea of *nil debet*, be obliged to allege, either that defendant never made the promise, or that it was absolutely void, or that it was voidable, or that it had been satisfied, or without being satisfied, had been discharged by some matter subsequent to the making thereof.

The English rules of court of Hilary Term, 1834, fully recognize, and even go beyond these views. They do away with the plea of *nil debet*, and substitute that of *never indebted*, which operates only as a denial of the *fact of the promise*, leaving all other defences to be pleaded *specialty*. (St. Pl. 156; Appendix lvii.) But this wholesome policy has not

IN ASSUMPSIT.

Non Assumpsit.

Title of Court. Circuit Court of A. County, to-wit:
and Rules. ——— Rules, ———

<i>Commencement.</i>	David Debtor	And the said defendant, by his attorney,
<i>Appearance.</i>	ads.	comes and says, that he did not undertake
<i>Body of plea.</i>	Charles Creditor.	or promise in manner and form as the said
<i>Conclusion.</i>		plaintiff hath above complained. And of
<i>Tender of issue.</i>	this the said defendant puts himself upon the country.	

O., p. d.

Offer of defence is omitted in pursuance of statute, V. C. 1873, c. 167, § 29; and *actio. non* pursuant to the general rule above stated. (*Ante*, p. 638.)

Thus far the proofs admitted under the general issue which have been examined, conform to the *language* of the issues; and although that language is more comprehensive than is desirable, there is no inconsistency in the latitude assigned to the pleas respectively; but with regard to this general issue of *non assumpsit*, and that which follows of *not guilty* in trespass on the case in general, the case is different.

The declaration in the action of trespass on the case in *assumpsit*, states that the defendant, upon a certain consideration therein set forth, made a certain promise to the plaintiff, (St. Pl. 40; *Id.* (Tyler's Ed.) 72.) The general issue of *non-assumpsit* avers that defendant "did not undertake or promise in manner and form," &c. This, according to *its terms*, puts in issue merely the fact of the defendant's having made a promise such as is alleged. A much wider effect, however, in practice belongs to this plea, for which two reasons have been assigned. The first, suggested by Mr. Stephen, is that it is owing to the fact that the action of *assumpsit* is not unfrequently founded upon an *implied promise*, as well as upon an *express one*; and that the extension of the issue of *non assumpsit* was at first applied only in those cases where the promise was *implied from circumstances*, it being deemed not unreasonable that under a plea denying the promise, any circumstances should be provable which tended to repel the implication. And the doctrine having been once established in respect to *implied assumpsits*, it was, by a fallacious analogy, ultimately extended to such also as are *express*. The other reason has all the authority to be derived from

the name of Lord Mansfield; but savoring as it does of his loose *equity views* of legal doctrines and processes, is not much regarded at present. It is that the action of *assumpsit* (as well as other actions *on the case*), is founded on the mere justice and conscience of the plaintiff's case, and is *in the nature of a bill in equity, and in effect is so*; and, therefore, a release, payment, accord and satisfaction, or in short, whatever in equity and conscience will preclude the plaintiff from recovering, may properly be given in evidence under a plea which *denies the existence of the demand*, (St. Pl. 162, n (20); Id. (Tyler's Ed.) 173-'4; Bird v. Randall, 3 Burr, 1353; 1 Chit. Pl. 527.)

But whatever may be the explanation, the fact is undeniable, that for more than a century past, there have been admitted under the plea of *non-assumpsit* in all actions of assumpsit, whether founded on an implied or an express promise, any matter of defence whatever, (with a few exceptions, the same as in the case of *nil debet*, Ante, p. 641,) which tends to deny his liability to the plaintiff's demand. (St. Pl. 162, n (20); Id. (Tyler's Ed.) 176; 1 Chit. Pl. 511.)

This is a very great deviation from principle. It allows the defendant to prove under the general issue, which is by *way of traverse*, matter which *confesses and avoids* the declaration, such as *release, payment, &c.*; and even though the matters of defence be not in confession and avoidance, they are oftener than otherwise inconsistent with the language of the plea, which (as has been seen), purports to deny *the promise only*, and to traverse no other part of the declaration. (St. Pl. 162, n (20); Id. (Tyler's Ed.) 176.)

The rules of court of Hilary Term, 1834, have wisely done much to correct this anomaly, so subversive of the principles and objects of pleading, and that too in an action one of the most frequent and general in its application by limiting the use of such issue to the cases imported by its terms. (St. Pl. 160-'61; Id. App'x, lvi.)

This example has unfortunately not been imitated in Virginia, notwithstanding we have adopted so many of the reforms initiated by the rules of court referred to, and the common law prevails here unchanged, save only the provision first introduced in the Code of 1849, allowing the court to oblige parties *to state the particulars* of their demand or defence,

if required, which appears to have been designed to achieve indirectly, the same result as the English Rules of court. (V. C. 1873, c. 172, § 49.)

TRESPASS ON THE CASE IN GENERAL.

Not Guilty.

Title of Court. Circuit Court of A. County, to wit:
and Rules. _____ *Rules.* _____

<i>Commencement.</i>	David Debtor	And the said defendant, by his attorney,
<i>Appearance.</i>	ada.	comes and says that he is not guilty of the
<i>Body of plea.</i>	Charles Creditor.	<i>promises</i> above laid to his charge, in manner
<i>Conclusion.</i>		and form as the said plaintiff hath above com-
<i>Tender of</i>	plained. And of this the said defendant puts himself upon the	
<i>issue.</i>	country.	R., p. d.

Offer of defence omitted in pursuance of the statute, V. C. 1873, c. 167, § 29; and *actio. non* in conformity with the rule above stated, p. 638.

The declaration in *trespass on the case in general* sets forth specifically the subject of complaint; and this general issue of *not guilty, in terms* is a mere traverse of the facts alleged in the declaration, and, therefore on principle should be applied only where the defence *rests on such denial*. But here a relaxation has taken place, similar to that which prevails in *trespass on the case in assumpsit*; for under the plea in question, not only is a defendant permitted to contest the declaration, but with certain exceptions, (*e. g.* the statute of limitations, the *truth* in an action of libel, &c.,) to prove any matter of defence which tends to show that the plaintiff has no right of action, though the matter be in confession and avoidance, as *e. g.* a *release given*, or *satisfaction made*. This relaxation of the just principles of pleading seems to have no other excuse but that of a forced analogy to the similar practice in *trespass on the case in assumpsit*. (St. Pl. 162, n (20); Id. (Tyler's Ed.) 178 '9.)

Here too, the rules of court of Hilary Term, 1834, have vindicated and restored the proper and reasonable principles of pleading, by confining the plea in question to the point covered by its language, namely, the denial of the wrongful act alleged. (St. Pl. 160; Id. App'x lviii, lix.) But in Virginia the common law remains unchanged, save as above stated, (*Supra* p. 645,) by the act of 1849. (V. C. 1873, c. 172, § 49.)

TRESPASS VI ET ARMIS.

Not Guilty.

Title of Court. Circuit court of A. county, to wit:
and Rules. — Rules, —

<i>Commencem't.</i>	David Debtor	And the said defendant, by his attorney,
<i>Appearance</i>	ads.	comes and says, that he is not guilty of
<i>Body of plea.</i>	Charles Creditor.	<i>the said trespass</i> above laid to his charge,
<i>Conclusion.</i>	or any part thereof,	in manner and form as the said plaintiff hath
<i>Tender of issue.</i>	above complained.	And of this he puts himself upon the country.
		O., p. d.

Offer of defence and *actio. non* omitted for the reasons so repeatedly stated. (*Ante*, p. 640.)

The general issue of *not guilty*, in trespass, amounts plainly, in its terms, to a denial of the trespasses alleged, and no more. But it will be observed, that such denial, in case of trespass on land or on chattels, may *logically* involve as well the title, or at least the right of the plaintiff to the *possession* of the property, as the fact of the defendant's committing the acts complained of. (St. Pl. 162, n (20); Id. (Tyler's Ed.) 174.)

But here again the rules of court of Hilary Term, 1834, have intervened, and forbidden the plea to be understood to deny the right to the property, or to its possession, but only the act of trespass alleged. (St. Pl. 159-'60; Id. App'x (x).) But in Virginia the plea remains as at common law.

It may be stated, in conclusion of the doctrine applicable to the *general issue*, that if the defence go to show that although there was a lawful cause of action when the suit was begun, it has been discharged since, the defendant ought to plead it specially to the *further maintenance of the action*, or if it occur after a plea pleaded, *puis darrein continuance*, since the last continuance. (Nichols v. Campbell, 10 Grat. 560; 1 Chit. Pl. 696-'7.)

3^k. Special Traverse, or Traverse with an *absque hoc*.

The *special traverse*, or as it is sometimes denominated, the traverse with an *absque hoc*, or *formal traverse*, or simply *traverse*, (1 Chit. Pl. 653,) though formerly of frequent occurrence, has now fallen into such practical disuse, that were it not that it well illustrates several of the principles of pleading, one might perhaps forbear to dwell upon it. It is a qualified denial of the adversary's allegation, and is composed of two parts, namely, (1), The inducement

or explanation, which is designed to qualify the denial; and (2), The categorical denial, or traverse itself, under the remarkable *formula* of the *absque hoc*. The special traverse is employed, either because,

(1), A direct and unqualified denial would be *opposed to some principle or rule of law*; or,

(2), Because it is desired to *separate questions of law from those of fact*; or,

(3), Because the defendant (or the party so pleading) wishes to *open and conclude the cause*.

This may be made plain by two or three examples.

(1), Employment of a special traverse because an unqualified and unexplained denial is *opposed to some principle or rule of law*.

Thus, if in an action of covenant by the *heir of a lessor*, against the lessee of land for *non-payment of rent*, the fact be that the lessor had no more than an estate *for his life* in the premises, so that the heir has no interest therein, and the lessee should traverse in the common form, by averring "that after the making of the said lease, the reversion of the said demised premises did not belong to the said lessor *and his heirs*," &c., it would expose him to the objection of violating the well-known rule of law, whereby a tenant is precluded (or in technical phrase, *estopped*,) to say that his lessor *had no title* in the premises demised. Instead, therefore, of the general assertion that the reversion did not belong to the lessor and his heirs, which might seem to fall within this prohibition, the lessee, by means of a *special traverse*, may so qualify the denial of the lessor's title, as to show that he does not intend to controvert it entirely, but only to aver that it *expired with his life*, which the rule in question does not forbid. (Brudnell, v. Roberts, 2 Wils. 143.)

(2), Employment of a special traverse in order to *separate questions of law from those of fact*.

Thus in an action on the case *for waste*, if defendant pleads the general traverse (or issue,) *not guilty*, the whole case upon that issue, must be determined by a jury. Now suppose the destruction in question had been committed not by *public enemies*, but by *rebels in arms*. It might be very desirable to the defendant not to submit to the jury the question of law whether destruction so occasioned is technical waste or not, but to have it determined by the court. If that be his object, he might effect it by pleading by

way of *special traverse*, setting forth by way of *inducement*, (as the qualifying or explanatory matter is called,) that the destruction was occasioned by the over-powering violence of rebels against the existing government, marshalled in arms and in warlike array, which violence it was impossible for him to resist; and then under the *absque hoc* (as it is styled), denying the waste charged: "*without this* that the said defendant was guilty of the said waste and destruction in the declaration mentioned." (Greene v. Cole, 3 Saund. 252 & seq.)

To such a *special traverse* the plaintiff must either *demur*, upon the ground that destruction wrought by rebels, however irresistible, is no less *waste in law* than when occasioned by a mob, or he must join issue *upon the fact* alleged, and insist that the waste was not brought about by rebels in arms as stated in the plea. In the latter case all question as to the law is waived, and the jury are charged with a mere matter of fact; in the former the question is one exclusively of *law*, which the court decides.

(3), Employment of a *special traverse* in order to obtain for the party pleading the privilege of *opening and concluding the cause*.

The defendant is allowed upon such a plea to open and conclude the cause, because the *affirmative of the issue, and, therefore, the burden of proof, is upon him*. Thus, in Crosskeys Co. v. Rawlings, 3 Bingh. N. C. (32 E. C. L.) 71, the action was trespass for breaking the plaintiff's draw-bridge, by carelessly bringing a vessel, under command of the defendant, in violent collision with it. The defendant, instead of pleading by way of the general traverse (*or issue*), by denying that he was guilty of the wrong, undertook to do so with an *inducement*, by way of explanation, alleging that the plaintiffs had so obstructed the water-way between the piers of their draw, that a constant and very strong current was created just at that point, whereby vessels passing through the draw were liable, notwithstanding the utmost pains and care which those who navigated them could take, to be carried violently against one or other of the piers, and that defendant had used due care in the management of his vessel; *without this* that he was guilty of any negligence, &c.

With us, the defendant would not secure this last advantage by a *special traverse*, in any case where the plaintiff has *anything to prove*, although it be

only the *quantum* of damages, and, therefore, not in any case of *unliquidated damages*, whether the action be *ex delicto* or *ex contractu*. (Young v. Highland, 9 Grat. 16; Overton's Heirs v. Davison, 1 Grat. 211; Steptoe's Adm'rs v. Harvey Ex'ors, 7 Leigh, 501.)

The best explanation of the *rationale* of the *special traverse* is given by Mr. Stephen, (St. Pl. 165; Id. (Tyler's Ed.) 181 & seq); but as it may be useful to consult other elementary writers, the student is referred also to 1 Chit. Pl. 653; 1 Tidd's Pr. 684, 685 & n (a); Gould's Pl. c. VII, § 6, &c.; Tyewhitt's Mod. Pl. 102; 1 Saund. 103, a note.

Among the later cases where it has been employed, the following may be cited: Craven v. Sanderson, 4 Ad. & El. (31 E. C. L.) 666, (A. D. 1836); Gould v. Bryan, 2 M. & Wels. 770, (A. D. 1837); Harrington & als v. Bishop of Litchfield, 4 Bingh. N. C. (33 E. C. L.) 308, (A. D. 1838); Wilson v. Craven, 8 Mees. & W. 593, (A. D. 1841.)

2^d. Pleas by way of *Confession and Avoidance*.

Pleas, and indeed *all pleadings* by way of confession and avoidance, always conclude with a *verification*, and must *really*, and not *professedly only*, confess the truth of the allegations which they affect to avoid; that is, they must give a *color* or *prima facie right* to the adversary, which the subsequent averments avoid. Color is always *implied*, that is, is *inherent* in every pleading which is *naturally* by way of confession and avoidance, as in case of the pleas of payment, release, infancy, &c. But in those instances where the natural and direct mode of making the contemplated defence or answer, is by way of *traverse*, but for some reason the pleader desires to plead by way of *confession and avoidance*, it is necessary to introduce into the pleading an artificial and fictitious color, which is denominated *express color*, and nominally at least, satisfies the rule in question.

The doctrine of *express color* is a curious, but not wholly useless relic of the subtlety of the old pleaders. It is practically confined to the *plea*, in the writs of *assize*, of *trespass*, and of *trespass on the case*. It consists in imputing to the plaintiff a feigned and *only colorable* title, which yet gives him an apparent *prima facie* right, and then affects to confess such colorable title, whilst it avoids it by setting forth in detail the real and better title of the defendant. The alternative is to *traverse* the plaintiff's declaration, and then, upon

the general issue so made up, the defendant must prove his *whole title*, deducing it through *all its steps*; the jury must determine *the law as well as the facts* involved therein, and the plaintiff has the *beginning and conclusion* of the cause at the trial.

If the defendant wishes to obviate any or all of these consequences of pleading by way of *traverse*, he may avail himself of the doctrine of *express color*, and plead by way of *confession and avoidance*, in either of the actions named above. Supposing it were an action of trespass *quare clausum fregit*, for breaking the plaintiff's close, the defendant would confess that the plaintiff, at the time of the act complained of, was in *possession* of the close in question, by virtue of a *parol demise* for life from one Z.; but that afterwards (nothing passing by the *parol demise* for life), Z.'s title became legally vested in the defendant, who thereupon entered upon the close so in possession of the plaintiff; which is the same trespass complained of by the plaintiff. And in alleging his title, the defendant would trace it *truly and minutely* from Z., in whom the plea admits the title to have been vested at the time of the *parol demise* to the plaintiff. Thus he might aver, according to the fact, that he derived his title *by last will* from X., who got it *by deed* from Y., on whom it *descended* from Z. The plaintiff then, if he means to contest *the law* of the defendant's title thus particularly set out, must *demur to the plea*, when the legal question will be submitted, not to the jury, but to the court; and if admitting the law, he means to controvert the *facts of the title*, he must *reply*; and in replying, he must select for attack *some one* of the degrees of title alleged by the defendant, and must *admit all the rest*, thus separating the facts from the law, and obliging the defendant to prove *one only* of the steps of his title instead of all.

Thus the issue, if it be one of fact, being joined upon matter *affirmed by the defendant*, he, according to the general rule in *England*, would have the *beginning and conclusion* of the argument of the cause. With us, however, the established rule of practice is, that the plaintiff shall always begin and conclude the argument, if he has anything (though it be *damages only*), to prove. (*Ante*, 649; *Young v. Highland*, 9 Grat. 16; *Overton's Heirs v. Davison*, 1 Grat. 211; *Steptoe's Adm'rs v. Harvey's Ex'ors*, 7 Leigh, 501.)

It seems the better opinion, that the failure to give color in a plea by way of confession and avoidance,

is ground at common law only of *special* demurrer (5 Rob. Pr. 215; Patrickson v. Barton, 3 Cro. (Jac.) 229; Horn v. Lewis, 1 Ld. Raym. 641; Weedon v. Woodbridge, 13 Ad. & El. N. S. (66 E. C. L.) 481); and supposing it to be so, the want of color cannot be taken advantage of with us at all. (V. C. 1873, c. 167, § 32.)

Upon the subject of *express color*, see St. Pl. 200 & seq; Id. (Tyler's Ed.) 206 & seq; 5 Rob. Pr. 212 & seq.

Pleas which *confess and avoid* the allegations of the declaration are very numerous indeed. It will suffice to name, by way of illustration, (1), Payment; (2), Set-off; (3), Special plea in the nature of a plea of set-off; (4), Statute of limitations; (5), Release; (6), Accord and satisfaction; (7), Gaming; (8), Usury; (9), Infancy; (10), Coverture of a female *at the time of the contract*. And some of these it will be proper to describe fully.

W. C.

1*. Plea of Payment.

The defence of payment is not to be pleaded *special*ly, except to a *sealed obligation*. When the promise is not under seal, payment *may be*, and, therefore, *must be* proved under the general issue of *nil debet* or *non assumpsit*; and to plead it specially in such a case is error, it being a general rule of pleading that what amounts to the general issue, that is, what can properly be proved under it, *must be so pleaded*. St. Pl. 162, n (20), 418; Id. (Tyler's Ed.) 173, 175, 360; but this rule is often disregarded in practice. (Dickinson v. Dickinson & Co. 25 Grat. 322, 324); and as the mistake is available only on special demurrer, (Van Ness v. Forrest, 8 Cr. 30; Auburn v. Weed, 19 Johns. (N. Y.) 300), it is supposed that it cannot be taken advantage of in Virginia, (V. C. 1873, c. 167, § 32.)

The plea of payment being by way of confession and avoidance, it would seem on principle, that it admits the instrument on which the action is founded to be as stated in the declaration, and that it is therefore needless to produce it at the trial; and consequently, that upon the payment alone no variance in the contents of the instrument is available for the defendant, and so it was held in Hubbard v. Blow, 4 Call. 224. But in Moore v. Fenwick, Gilman. 220, this doctrine was overruled upon the ground, that as the statute requires that the judgment shall be for the principal sum due, with interest thereon from the

time it became payable, &c., (V. C. 1873, c. 167, § 45), the court is under the necessity of inspecting the writing, to see the amount and dates of the credits endorsed thereon, and whence interest accrues.

At common law, if *penal bonds* are not paid at maturity, the penalty, as we have repeatedly seen, becomes in substance and reality the debt, as *in form* it still is with us and in England. Hence, at common law, payment of the principal sum *after the day*, is no defence to the *whole action*, but would avail only *pro tanto*. The court of chancery having adopted and long enforced the policy of constraining the creditor to accept his principal sum, with interest, the statute of 4 & 5 Anne, c. 16, introduced a similar practice into the courts of common law; and in imitation thereof it has long been a provision in our code, that in *any action* of debt, (doubtless *on a penal bill* or bond conditioned to pay money), the defendant may plead payment of *the debt*, (or of so much as is due *by the condition*,) before action brought, (V. C. 1863, c. 168, § 1); and judgment for the penalty is to be discharged by the payment of the principal, &c. (V. C. 1873, c. 173, § 16-'17.)

Form of a plea of payment.

3 Chit. Pl. 574-'5.

<i>Title of Court, and Rules.</i>	Circuit court of A. county, to wit: — Rules, —	
<i>Commencement.</i>	David Debtor	And the said defendant, by his attorney,
<i>Appearance.</i>	ads.	comes and [<i>defends the wrong and injury,</i>
<i>Formal defence.</i>	Charles Creditor.	<i>when, &c., and says, that the said plaintiff</i>
<i>Actio. non.</i>		<i>ought not to have or maintain his action afore-</i>
<i>Statement of matter of defence.</i>	<i>said thereof against him, because he</i>] says, that before the commence- ment of this suit, to wit, on the — day of —, in the year of our Lord eighteen hundred and seventy —, the said defendant paid to the said plaintiff the said sum of — dollars, in the plain- tiff's declaration demanded. And this he is ready to verify.	
<i>Conclusion.</i>		
<i>Verification.</i>		
<i>Prayer of Judgment</i>	[<i>Wherefore he prays judgment, if the said plaintiff ought to have or maintain his action aforesaid thereof against him.</i>]	

P., p. d.

The formal defence, the *actio. non*, and the prayer of judgment, may be omitted; the formal defence *always*, and the *actio. non*, and prayer of judgment, whenever the plea goes to the *whole action*. (*Ante*, p. 639; V. C. 1873, c. 167, § 25, 29.)

If *all the debt* demanded in the declaration is not paid, the foregoing form must be modified. It is an

established rule, that every pleading must be an answer to the *whole* of what is adversely alleged, or rather to so much thereof as it *professes to answer*. (St. Pl. 216; Id. (Tyler's Ed.) 215-'16; 1 Chit. Pl. 553, &c.) And if it does not propose to cover the whole of the adverse averment, it ought to specify in the commencement, to how much it is intended to apply. Hence, if the defendant means to insist on a *partial payment*, the plea should be framed accordingly. And if this rule be not attended to, and an answer made *professing* to respond to the whole of the adverse averment, but not doing so, the course is to demur. (1 Chit. Pl. 554; St. Pl. 217; Id. (Tyler's Ed.) 215-'16; 1 Saund. 28, n (3); Hunt's Adm'r v. Martin's Adm'r, 8 Grat. 578.) On the other hand, if the defendant offer such a partial plea, with a commencement conformable thereto, the plaintiff is entitled to judgment for the part unanswered; and this judgment he must not omit to take at the proper time, under penalty of having his *whole action* discontinued; for it is an entire thing, and being discontinued by not following up the part unnoticed in the plea, the whole is necessarily discontinued. (St. Pl. 216; Id. (Tyler's Ed.) 216; 1 Chit. Pl. 564; 1 Saund. 28, n (3); Herlakenden's Case, 4 Co. 62, a; Hunt's Adm'r v. Martin's Adm'r, 8 Grat. 578; Southall v. Exchange Bank, 12 Grat. 314.) It is competent, however, to the court, at the *next term*, in pursuance of the statute regulating proceedings in civil suits, to set the discontinuance aside, (V. C. 1873, c. 167, § 52), and to remand the cause to rules, or in its discretion to allow the proper pleadings to be filed, and judgment for the part unanswered to be taken *in court*, as should have been done at rules; but then the defendant must be allowed at his option to *continue the cause*. (Southall v. Exchange Bank, 12 Grat. 315-'16.)

FORM OF PLEA OF PART PAYMENT.

<i>Title of Court,</i>	Circuit Court of A. County, to wit:	
<i>and Rules.</i>	Rules, ———	
<i>Commencement.</i>	David Debtor	And the said defendant, by his attorney,
<i>Appearance.</i>	ada.	comes [<i>and defends the wrong and injury,</i>
<i>Formal defence.</i>	Charles Creditor.	<i>when, &c.,</i>] and says that as to — dollars,
	part of the sum in the declaration demanded, the said plaintiff	
<i>Actio non.</i>	ought not to have or maintain his action aforesaid thereof,	
<i>Statement of</i>	against him, because he says that before the commencement of	

<i>matter of defence.</i> <i>Conclusion.</i> <i>Verification.</i> <i>Prayer of Judgment.</i>	this suit, to wit: on the — day of —, in the year of our Lord eighteen hundred and seventy —, the said defendant paid to the said plaintiff the said sum of — dollars, part of the sum in the said declaration demanded. And this the said defendant is ready to verify. Wherefore, he prays judgment whether as to the said sum of — dollars, the said plaintiff ought to have or maintain his action aforesaid thereof against him.
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C., p. d.

Formal defence may be omitted here, as in all other cases, pursuant to V. C. 1873, c. 167, § 29. *Actio. non* and prayer of judgment retained, because the plea is not to the whole action. (V. C. 1873, c. 167, § 25; *Ante*, p. 639.)

It should be observed in respect to all pleas of payment, whether partial or in full, that if they do not so describe the payment relied on as to give the plaintiff notice of its nature (as from the form of the plea they would generally not do where partial payments had been made at several times), the defendant must file with his plea an account which will show the nature of the payments, or else cannot prove them. (V. C. 1873, c. 168, § 4.) And the same rule is also prescribed as to *set-offs*, which must be so described as to give the plaintiff notice of their nature, either in the plea or in an account filed therewith. (Ibid.)

The payment is not necessarily *in money*. It may be in any collateral commodity, such as debts due from third persons and the like, if the creditor agrees to accept such commodity in payment. (2 Greenl. Ev. § 519, 523, 526; Id. § 28; Huffman v. Walker, 26 Grat. 316; Perry v. Perry, Id. 325-'6.) But the nature of it must be adequately described, either in the plea or in the accompanying statement. (Perry v. Perry, 26 Grat. 323.)

2^k. Plea of Set-off.

A set-off is a *counter-demand* exhibited by the defendant against the plaintiff. The common law allows no such defence except so far as it arises *out of the same transaction*, in which case, indeed, it cannot properly be called a *set-off*, or *cross-demand*, but is merely a ground for reducing the plaintiff's recovery upon the transaction; and is technically distinguished as a *recoupment* (a cutting off, or discount from a demand). A set-off, in the proper sense of a *cross-demand*, was at common law recoverable only by a separate action. As a defence it originated in the statute 8 Geo. II, c. 22, which enacted that where

there are "*mutual debts* between the plaintiff and defendant," (that is, *debts due in the same right*, and between the *same parties*) "*one debt* may be set-off against *the other*." (Bac. Abr. Set-off; 2 Pars. Cont. 239 &c.; Chit. Cont. 840 &c.; Burrill's Law Dict. *recoupment*; Bart. Pr. 146.)

Our statute assumes *tacitly* the same general conditions, namely, that the demands *on both sides* shall be *debts*, and not unliquidated claims, and that they shall be essentially *mutual*. But our statute is less rigorous in terms than that of England; thus the English statute declares that "where there are *mutual debts* between the *plaintiff and defendant*, &c., one debt may be set against the other," &c., whilst ours admits of a more liberal construction of the mutuality required, and is satisfied with a substantial mutuality, rather than a literal one. Hence, our courts hold that respect is to be had to the real, and not to the nominal parties; and it is provided by the statute itself, that where the plaintiff's claim is jointly against several persons, and the set-off is a debt not due to all of them, but due to as many as are *principals*, the others standing in the relation of sureties, the counter-demand may be used as a set-off. The terms of the Virginia statute are as follows: "In a suit for *any debt*, the defendant may at the trial prove and have allowed against such debt, any payment or *set-off* which is so described in *his plea*, or in *an account filed* therewith, as to give the plaintiff *notice of its nature*, but not otherwise. Although the claim of the plaintiff be jointly against several persons, and the *set-off* is a debt *not to all*, but to *part of them*, this section shall extend to such set-off, if it appear that the persons against whom such claim is, stand in the relation of *principal and surety*, and the person entitled to the set-off is the *principal*." (V. C. 1873, c. 168, § 4; Allen v. Hart, 18 Grat. 729; Wartman v. Yost, 22 Grat. 604 & seq.)

It will easily be conceived that a defendant is not obliged to avail himself of the privilege of setting off his counter-demand. He may still maintain a separate suit therefor. And if he files a plea or notice of set-off, and is prevented by accident, surprise or other cause from proving it at the trial, he may and ought to withdraw it, and he may then bring a separate action for the amount. But if he submits his cross-demand for trial, and fails in his proof, any action therefor will thenceforward be

barred. (*Hudson v. Kline*, 9 Grat. 382-'3; *Huff v. Broyles*, 26 Grat. 284 & seq.)

In order to make the defence of set-off available under this statute, the following circumstances must concur, viz.:

(1), The plaintiff's demand must be *in the nature of a debt*, that is, a liquidated claim, and not one *merely for damages*, such as a jury may see fit to assess. But it is not needful that the action should be an *action of debt*. A *debt* may be recovered by the action of *assumpsit* when the promise is not under seal, or an action of *covenant*, when it is under seal, as well as by the action of debt; and the material question as to the defence of set-off, is not what the action is, but what is the nature of the plaintiff's demand. If in the nature of a *debt*, and an action at law be brought upon it, it may in Virginia be either legal or equitable. (*Winchester v. Hackley*, 2 Cr. 342; *Wartman v. Yost*, 22 Grat. 605-'6; 5 Rob. Pr. 955, 1012.)

(2), The demand proposed to be set-off must also be in the *nature of a debt*, and not a claim for unliquidated damages, but it may be either legal or equitable. (*Webster v. Couch*, 6 Rand. 519; *Robertson v. Hogshead*, 8 Leigh, 667; *Harrison v. Wortham & als*, 8 Leigh, 296; *Wartman v. Yost*, 22 Grat. 605-'6; 5 Rob. Pr. 955, 1012.)

(3), The demands must be due between the *same parties*.

Hence, a debt due from an individual partner cannot be set-off against a partnership demand, nor *vice versa*, a debt due from a partnership against an individual demand of one of the partners. In short, joint and separate demands cannot be set-off one against another, save in the special case provided for by our statute. (*Supra*, p. 656; *Scott v. Trents*, 1 Wash. 79; *Ritchie v. Moore*, 5 Munf. 388; *Porter v. Nekervia*, 4 Rand. 359; *Gilliat v. Lynch*, 2 Leigh. 493.)

The obvious policy of our statute in Virginia is to prevent multiplicity of suits, and as far as conveniently can be done, to effectuate in one action complete justice between the parties. (*Allen v. Hart*, 18 Grat. 729; *Wartman v. Yost*, 22 Grat. 605-'6.) And our courts, in this respect as well as in others, look to the real and not to the nominal parties to the suit, so that to an action on a bond, the defendant may set-off a judgment obtained by a

stranger against the plaintiff and *assigned to the defendant*, notwithstanding the defendant's claim in respect to the judgment is equitable merely, whilst that of the plaintiff is legal. (Wartman v. Yost, 22 Grat. 605-'6; Winchester v. Hackley, 2 Cr. 342.)

But the parties may, by *special agreement*, bring about a mutuality which did not originally belong to the transactions. (Ragsdale v. Hagy, 9 Grat. 409; Perkins v. Hawkins, Id. 649;) and on the other hand, a mutuality which would otherwise have subsisted may be obviated by a change in the relations of the parties; as where the plaintiff claims as *assignee*, and the set-off exhibited by defendant was not acquired until he *had notice of the assignment*. Thus, a bank may set-off its depositor's balance against his general indebtedness, notwithstanding the so doing may postpone debts of superior dignity in case of a decedent, the bank being in fact debtor on the deposit account only to the extent of the excess of deposits over the depositor's indebtedness, (Ford v. Thornton, 3 Leigh, 695); and a debtor of a bank may set-off *its notes* against his indebtedness; but if the bank has assigned its effects, proposing to go into liquidation, or where there has been a decree for an account in a creditor's suit against it, notes or certificates of deposit acquired by the debtor *after he had notice* of the assignment (as by the registration of the deed of assignment) or after such decree, would not be available as such set-off, except that the debtor might make them available to the extent to which his assignor might have done. (Exch. Bank v. Knox, 19 Grat. 739; Saunders v. White, 20 Id. 327; Finney v. Bennett, 27 Grat. 365. See also Davis v. Miller, 14 Grat. 9.)

(4), The demands must be due *in the same right*.

Hence a demand against an executor personally, cannot be set off against a debt claimed by him as executor, and so *vice versa*. Therefore a tenant having leased the testator's land *of an executor* (which makes the rent due *to the executor personally*) cannot set off a judgment which he has against the decedent. (5 Rob. Pr. 975; White & als v. Bannister, 1 Wash. 168; James v. Johnston, 22 Grat. 461); and for a like reason a party buying goods of a decedent *from the executor*, cannot, *without a special agreement*, set off against that demand debts due from the decedent, (Brown v. Garland, 1 Wash. 221; Pulliam v. Winston, 5 Leigh, 324.) And so also a defendant cannot

set off against a debt due to a decedent, for which the administrator brings an action, money paid by him as *surety for the deceased*, since his death, (*Minor v. Minor*, 8 Grat. 1.) Nor can a joint interest in *husband and wife* be set off by a debt due from the husband. (*Glazebrook v. Ragland*, 8 Grat. 333.)

(5). The demand proposed to be set off must be *actually due and payable*.

In England it must be due and payable at the time when the plaintiff's action was commenced, (5 Rob. Pr. 961; *Evans v. Prosser*, 3 T. R. 188.) In Virginia, it suffices if the demand was due at the time of filing the plea or notice of set-off; and if the plaintiff sue as assignee, it is required that any set-offs against the assignor relied on by the defendant should have been acquired before he had *notice* of the assignment. (5 Rob. Pr. 1000; *Ritchie v. Moore*, 5 Munf. 395; *Stewart v. Anderson*, 6 Cr. 203; *Clopton v. Morris*, 6 Leigh, 278.) This doctrine, as it respects assignees, would be established independently of adjudged cases, by the terms of the statute of assignments cited in the next paragraph, (V. C. 1873, c. 141, § 17.) And that reference is to be had, in general, to the time of filing the plea or notice of set-off, appears not only from the determinations of the courts, but also from a provision of the statute of set-off presently to be mentioned, (V. C. 1873, c. 168, § 9.)

But whilst a set-off may thus accrue or be acquired, either before or after the suit is brought, and up to the time of the filing of the plea or notice, and possibly, even up to the time of trial, yet it is with this proviso, that if acquired after suit brought, the plaintiff will be entitled to a judgment for costs, even though the set-off extinguishes the plaintiff's claim, and leaves an excess due to the defendant. (2 Tuck. Com. 108; *Allen v. Hart*, 18 Grat. 729; *Barton's Pr.* 147.)

It should have been observed under the third head, that in case of assignments of debts, the assignee must, by the general doctrine of equity, as well as by the express provisions of the statute of assignments, allow all *just discounts* (which includes set-offs as well as other equities), not only against himself, but against the assignor, *before the defendant has notice* of the assignment. (V. C. 1873, c. 141, § 17; *Jameson v. Deshields*, 3 Grat. 4, *Wayland v. Tucker*, 4 Grat. 267; *Hupp v. Hupp*, 6 Grat. 310.)

The defence of set-off may be made (as appears from the terms of the statute, and as has been long estab-

lished in practice), either *by plea* or *by notice merely*, which is usually endorsed on the bond, note, or account, evidencing or containing the particulars of the cross-demand, that the same will be relied on at the trial as a set-off. (1 Chit. Pl. 605; Perkins v. Hawkins, 9 Grat. 653.) This notice is usually and prudently accompanied by a plea of the general issue, *nil debet* or *non-assumpsit*; but that does not appear to be necessary. And it should be observed that, where the defence is presented, not by plea, but *by notice*, as the plaintiff has no day in court *to reply the statute of limitations* to the set-off, he may avail himself of it at the trial, without pleading it; but it is otherwise if the set-off *be pleaded*. (Trimyer v. Pollard, 5 Grat. 460.) A question was suggested in the case just cited *at what date*, in respect to the applicability of the statute of limitations, the action *on the set-off* should be considered as instituted; whether at the commencement of the original suit, or when the set-off was pleaded or filed; and it was determined that if the set-off accrued before the institution of the original action, the suit upon it was to be considered as having been *then commenced*; and if it accrued afterwards, the suit upon it should date from the *filing of the plea or notice* of set-off. Our statutes, however, have since made the last the uniform rule in all cases, enacting that the defendant shall be deemed to have brought his action on the set-off when he *pleads or files it*, and the plaintiff shall not afterwards dismiss the suit without defendant's consent. (V. C. 1873, c. 168, § 9.)

The statute of 8 Geo. II, c. 22, and our own statute prior to 1850, did not allow the defendant the advantage of recovering of the plaintiff *any excess* of the set-off over the demand claimed by the plaintiff, but allowed him only to repel the plaintiff's debt, obliging him to recover the surplus, (if at all) in an independent suit. By a great innovation upon the practice of the *law courts*, but in conformity with the usage of the courts of equity, the Code of 1849, very judiciously allows the defendant to have judgment against the plaintiff *for any excess* of the ascertained amount of the set-off over the sum to which the plaintiff is found to be entitled. (V. C. 1873, c. 168, § 9.)

For the most part *equity follows the law* in the doctrine of set-off; but there are cases where a court of chancery has allowed a set-off when it could not be

admitted in a court of law; and that upon the ground, that *irremediable loss* would otherwise result to the defendant; as for example, where his demand is *not yet payable*. (Feazle v. Dillard, 5 Leigh, 30; McClellan v. Kinnaird, 6 Grat. 352; Hupp v. Hupp, Id. 310; See also Gilliat v. Lynch, 2 Leigh, 493; Taylor v. Spindle, 2 Grat. 44; Ragsdale v. Hagy, 9 Grat. 381; 2 Stor. Eq. § 1434, 1437.)

3*. Special Plea in the Nature of a Plea of Set-off.

A special plea in the nature of a plea of set-off is a creature of our Virginia statutes; and the statute having been first enacted in 1831, it is often called a plea *under the statute of 1831*, and is sometimes classed, very improperly in many instances, amongst "*equitable defences*."

The common law allows no want of failure of consideration, no fraud in the procurement of the contract, no mistake therein, nor any antecedent matter whatsoever to be brought forward by plea *against a sealed instrument*; the *seal*, by reason of the solemnity of the act affixing it being regarded as *estopping* all such inquiries. (Chew's Ex'ors v. Moffett & ux, 6 Munf. 120; Taylor v. King, Id. 358; Wyche v. Marlin, 2 Rand. 426; Tomlinson's Adm'r v. Mason, 6 Rand. 169.) The *want of consideration* is not available anywhere, but *failure of consideration*, (as for example, by the breach of warranty of the title, or soundness of a chattel for the price of which the contract was made), or *fraud in the procurement* of the contract, are remediable by an action at law for damages; and also when the failure or the fraud goes to the very foundation of the contract, by a bill in equity to *rescind the contract*. (Robertson v. Hogsheads, 3 Leigh, 673; Webster v. Coush, 6 Rand. 519; Duncan v. Lyon, 3 Johns. C. R. (N. Y.) 351; Livingston v. Livingston, 4 Id. 287.)

Where the contract is *not sealed*, all the circumstances above enumerated may, even at common law, be proved by *way of defence* to the action on the contract, or may be the subject (except in the case of *mistake*,) of a separate action for damages. But where they are made the subject of defence, their whole effect is exhausted in reducing or preventing the plaintiff's recovery. No *excess* can ever be recovered by the defendant in that action.

The statute in question was designed to give a remedy to the defendant in all these cases, by means of a *plea to the plaintiff's action*, so as to make one

suit suffice to dispose of the whole controversy, and to enable the defendant to recover of the plaintiff any excess whereby the amount of damages to which the defendant should appear to be entitled should exceed the plaintiff's demand.

The statute is as follows:

"In any action *on a contract*, (that is, whether under seal or not), the defendant may file a plea alleging any such failure in the consideration of the contract, or fraud in its procurement, or any such breach of any warranty to him of the title or the soundness of *personal property*, for the price or value whereof he entered into the contract, or any other matter as would entitle him either to recover *damages at law* from the plaintiff, or the person under whom the plaintiff claims, or to *relief in equity* in whole or in part against the obligation of the contract; or if the contract be *by deed* alleging any such matter arising *under the contract*, existing *before its execution*, or any such *mistake therein*, or in the execution thereof, or any such other matter as would entitle him to *such relief in equity*; and in either case alleging the amount to which he is entitled by reason of the matters contained in the plea. Every such plea shall be verified by affidavit." (V. C. 1873, c. 168, § 5.) It is stated, however, out of abundant caution, that nothing in the statute shall impair or affect the obligation of any bond or other deed *deemed voluntary* in law, (that is, *without valuable consideration*,) upon any party thereto, and his representatives. (V. C. 1873, c. 168, § 7; *Harris v. Harris' Ex'or*, 23 Grat. 737.)

The same provisions are also applicable as have been already noticed in respect to the *plea of set-off*. Thus the suit for the set-off is deemed to have been brought when the *plea is filed*, and thereafter, the plaintiff cannot dismiss his suit without the defendant's consent, but shall be entitled to every defence which he might have had in any action brought against him on the same demand. And on the trial, if the jury find that the defendant is entitled to more than the plaintiff, the defendant shall have *judgment for the excess*. (V. C. 1873, c. 168, § 9.) Hence, the defendant should take care in laying his damages in the plea, to state at least as large a sum as he can expect to prove; for he is not at liberty to divide his action, and claim part of the damages he is alleged to have sustained by way of set-off, and afterwards main-

tain an independent suit for the residue. (*Huff v. Broyles*, 26 Grat. 285, 288.)

Another provision there is, which is applicable to the *plea of set-off*, but which was omitted in connection therewith, namely: that where the defence applies to only *part of the plaintiff's demand*, judgment shall be forthwith rendered for the part not controverted, and the *costs then accrued*, and the case proceeded with for the residue, as if that had been the whole demand. And if there be some other plea going to the residue, or to the whole of the demand, the case shall not be continued as to such other plea, unless it be either sworn to or good cause for a continuance be shown. (V. C. 1873, c. 168, § 8.)

This provision, except as to the costs, is a mere affirmation of established principles of common law practice, (St. Pl. 216-'17; *Hunt v. Martin*, 8 Grat. 578; *Southall v. Exchange Bank*, 12 Grat. 312,) and that it should be deemed needful for the legislature to interpose to declare it is but too suggestful of the pernicious looseness in which many practitioners indulge and are indulged.

It is further provided, in respect to the *special plea of set-off* now under consideration, that if the defendant do not tender it, or if it be tendered and be rejected for *not being offered in due time*, he shall not be precluded from such relief in equity as he would have been entitled to if the statute had not been enacted. But if the plea be rejected *as bad*, or adjudged insufficient on demurrer, or if issue being joined on the plea, it be found against the defendant, he shall be barred of relief in equity upon the matters alleged in the plea, unless upon such grounds as would entitle a party to relief in other cases. (V. C. 1873, c. 168, § 6; *Hudson v. Kline*, 9 Grat. 382; *Huff v. Broyles*, 26 Grat. 284 & seq.)

The issue in fact on such a plea is upon a *general replication* thereto, that the *plea is not true*; and the plaintiff may give in evidence on such issue any matter which could be given in evidence under a special replication, if such replication were allowed. (V. C. 1873, c. 168, § 6.)

A number of cases have occurred illustrating the use of a special plea in the nature of plea of set-off, as in the case of a *warranty of quality* of chattels, (*Thornton v. Thompson & als*, 4 Grat. 121; *Fleming v. Toler*, 7 Grat. 301); of *fraudulent misrepresentations* of quality, (*Fleming v. Toler*, 7 Grat. 301;

Cunningham v. Smith, 10 Grat. 255); of *failure to deliver* a chattel sold, (Isbell's Adm'r v. Norvell's Ex'or, 4 Grat. 176); of *failure to make repairs* on leased premises, according to contract, (Murray & als v. Pennington, 3 Grat. 91); of *failure of title to land*, in which case the defence rests on the ground of *failure of consideration*, (Pence v. Huston's Ex'or, 6 Grat. 304); but not where the failure is based on equitable grounds, which require a *rescission of the contract*, and a re-investment of the vendor with the title, for in such a case the court of law is incompetent to do complete justice between the parties. (Shiflett v. Orange, Humane Soc., 7 Grat. 297; Watkins v. Hopkins, 13 Grat. 743.) And even when the justice of the case can be reached by means of such a special plea in the court of law, and when, therefore, such plea is admissible, if it introduces matter such as but for the statute would have formed an *equitable defence*, the rules governing an equitable forum must prevail in the application of the plea. Thus where a defendant, in order to reduce the recovery on bonds for the purchase-money of land, proposes by a plea of this character, to show a *deficiency in the quantity of the land*, (being *pro tanto* a failure of the consideration), the plaintiff must be permitted to rebut the claim by any evidence which would be appropriate to his defence, had the defendant, instead of filing his plea, elected to proceed by bill in equity. (Caldwell v. Gray, 21 Grat. 132.)

It hardly needs to be said that in order to warrant a resort to a plea of this description, it must be made to appear that the matter of defence is of the character contemplated by the statute, as the subject of such a plea. Hence, in an action on a bond for the last payment for a tract of land, a plea setting forth that the plaintiff had stipulated to make a good title *on payment of the bond*, and that the defendant had offered to pay *upon the making of the title*, which plaintiff refused and failed to do, whereby there was a *failure of consideration*, is not a good plea. (Watkins v. Hopkins, 13 Grat. 743.) So also, it is not a good plea that there was *no consideration* for a promise under seal, the statute applying where there was once a valuable consideration which *has failed*, but not where was never any consideration at all. (Harris v. Harris' Ex'or, 23 Grat. 751; Cunningham v. Smith, 10 Grat. 255; Watkins v. Hopkins, 13 Grat. 743.)

The case of Thornton v. Thompson & als, 4 Grat.

121, affords a good example of the operation of such a plea as is under consideration. The plaintiff in that case had sold the defendant *a jack* for \$1,500, warranting him "sound in every particular," and defendant paid \$900, and gave his bond for \$600, and on that bond the suit was instituted. The plea stated that the animal was warranted sound and capable, but that he was in fact wholly useless as a foal-getter, and was worth only \$150, instead of \$1,500; so that defendant had sustained damage to the amount of \$1,350, in consequence of the plaintiff's breach of his said warranty; which sum of \$1,350, the defendant was ready and willing, and thereby offered to set-off and allow against the debt in the declaration demanded. To this plea there was a general replication as the statute prescribes, and issue was joined thereon. The jury found the averments of the plea to be true, and whilst they gave the plaintiff his debt, they assessed the damages sustained by the defendant at \$1,350; and the court gave judgment for the defendant for the excess, namely, \$750; thus in that action settling a controversy which, apart from the statute allowing a plea of this kind, must have been renewed in the form of an action by the purchaser upon the warranty, whilst he, meanwhile, would have been required to pay the \$600 in discharge of his bond.

Had the evidence of debt in this case been a *promissory note* instead of a bond, the statutory plea, although not so necessary, would still have been highly useful. In an action on the note, the defendant *upon the general issue* might have shown the warranty and its breach, and have so repelled the plaintiff's action, but he would not have *recovered the excess*. For that he must have brought a separate action upon the warranty; and it is believed to be the better opinion that, supposing him to have availed himself of the warranty in order to repel the action for the purchase-money, he cannot afterwards present the same demand again in an action on the warranty. (*Huff v. Broyles*, 26 Grat. 285, 288-'9. But see 1 Chit. Pl. 603; 2 Pars. Cont. 251; *Hennell v. Fairlamb*, 3 Esp. 104.) The statutory plea, however, enables the purchaser at once, and in the same action, to meet and repel the vendor's demand, and also to recover the excess; which in some of the United States may be done independently of statute. (2 Pars. Cont. 251.)

It will be expedient here to exhibit a form of a special plea of this nature, as one is not to be found in Mr. Chitty's collection, of course, and yet must be often employed.

FORM OF SPECIAL PLEA IN THE NATURE OF A PLEA OF SET-OFF.

Title of Court. Circuit Court of A. County, to wit:

Rules. ——— Rules ———.

Commencement. David Debtor And the said defendant, by his attorney,
Statement of ads. comes and says that before the making of
Defence. Charles Creditor. the said writing in the said declaration mentioned, to wit: on the ——— day of ——— in the year of our Lord eighteen hundred and seventy——, the said plaintiff, in consideration that the said defendant would buy of him a certain horse, at and for a certain price, to wit, for the sum of ——— .. dollars, to be therefore paid by the said defendant to the said plaintiff, undertook, and then and there faithfully promised the said defendant, that the said horse then was sound, and that he, the said plaintiff, then had a good, perfect, and indefeasible title to the said horse, and a perfect right to sell the same. And the said defendant avers that he, confiding in the said promise and undertaking of the said plaintiff, did afterwards, to wit, on the day and year last aforesaid, buy the said horse of the said plaintiff, and did then execute and deliver to the said plaintiff the writing aforesaid, whereon this action is founded, for the price aforesaid of the said horse, and there was no other consideration or inducement whatsoever for the making of the said writing. And the said defendant further says that the said plaintiff did not perform or regard his said promise and undertaking, but therein wholly failed in this: that the said horse, at the time of the making of the said promise and undertaking of the said plaintiff, was not sound, but on the contrary thereof, was unsound; and moreover, that the said plaintiff had not then a good, perfect, and indefeasible title to the said horse, and a perfect right to sell the same; but on the contrary thereof, the said horse was then the property of another person, to wit, of one J. S., by whom the said horse afterwards, to wit, on the ——— day of ——— in the year of our Lord eighteen hundred and seventy——, was by due process of law recovered of and from the said defendant, as and for the property of the said J. S. And the said defendant avers that, by reason of the breaches aforesaid of the said promise and undertaking of the said plaintiff, the said horse became and was of no use or value to the said defendant. And the said defendant says that, by reason of the premises aforesaid, he hath sustained damages amounting in the whole to a large sum of money, to wit, to the sum of ——— dollars, which is still unpaid, and due and owing from the said plaintiff to the said defendant; and the said defendant is ready and willing, and hereby offers, in pursuance of the statute in such case made and provided, to set-off and allow the same against the sum of money payable to the said plaintiff by the said defendant, by force of the said writing upon which this action is founded. And this the said defendant is ready to verify.

Conclusion.

Offer to verify.

P., p. d.

*Affidavit.*V. C. 1878, c.
168, § 5.

Virginia :

A. County to wit :

This day David Debtor appeared in person before me, a justice of the peace in and for the county and State aforesaid, and made oath that the statements in the foregoing plea are true. Given under my hand this — day of — in the year of our Lord 187—.

W. W., J. P.

Formal defence omitted pursuant to V. C. 1878, c. 167, § 29. *Actio. non* omitted in this case, pursuant to V. C. 1878, c. 167, § 25, and also *prayer of judgment*. If the plea had exhibited an off-set extending to but a part of the demand, the *actio. non* and the *prayer of judgment* must have been introduced.

4^k. Plea of the Statute of Limitations.

The statute of limitations is one of the very few defences which cannot be given in evidence under the general issue of *nil debet* and *non-assumpsit*. It must always be *pleaded specially* by the defendant, and in cases of set-off, *by the plaintiff*, where the set-off is *pleaded*. If notice of it only be given, the plaintiff having no day in court to reply the statute, must be allowed to avail himself of it at the trial without pleading. (1 Chit. Pl. 315 ; Id. 607-'8.)

In framing the plea it ought not to be expressed in the *alternative*, "that the said supposed cause of action (*if any such there were*) did not accrue to the said plaintiff at any time within — years," for that is contrary to an express rule, that "pleadings must not be in the *alternative*." (St. Pl. 387 ; Id. (Tyler's ed.) 389.) Neither is it expedient, nor always admissible, to aver that "*the promise was not made*," or that "the defendant *did not assume* in manner and form as by the plaintiff is alleged, within — years next before the commencement of this action," for the *cause of action* may not have been contemporaneous with the *promise*, but may have accrued *afterwards*, as when the promise was to pay money at a *future day*. The proper mode of averment (which is *always proper*) is, that "*the cause of action did not accrue* within — years next before the commencement of the action." It is a little remarkable that Mr. Stephen himself should have fallen into this inaccuracy. (St. Pl. 154 ; Id. (Tyler's ed.) 167.)

This plea being by way of confession and avoidance, it of course admits the cause of action stated in the declaration to have been *originally valid*. (Brockenbrough v. Hackley, 6 Call. 51.)

Form of Plea of Statute of Limitations.

V. C. 1873, c. 146, § 8; 3 Chit. Pl. 956 a.

Title of Court. Circuit Court of A. County, to wit:

Rules. — — Rules, — —

Commencement.	David Debtor	And the said defendant, by his attorney,
Statement of	ads.	comes and says that the said supposed cause
matter of	Charles Creditor.	of action [or if there be several causes, say
defence.		<i>"the said several supposed causes of action"</i>] in the said declaration
		mentioned did not [or if there be several causes, say <i>"nor did any</i>
		<i>or either of them"</i>] accrue to the said plaintiff at any time within
		<i>five years</i> next before the commencement of this suit, in manner
Conclusion.		and form as the said plaintiff hath above thereof complained
Offer to verify.	against him.	And this he is ready to verify. C., p. d.

Formal defence omitted pursuant to V. C. 1873, c. 167, § 29.
Actio. non and *prayer of judgment* omitted pursuant to V. C. 1873,
c. 167, § 25.

The form, and indeed the doctrine of a plea of the statute of limitations, (the period of which is *two years*,) to a *retail store-account*, merits special attention. It will be remembered, that the provisions of the statute upon that subject, (*Ante*, p. 508,) are that every action to recover money for articles charged in *any store-account* shall be brought within *two years*, (V. C. 1872, c. 164, § 8); and that the statute contemplates,—

1, *Retail* store-accounts only. (Tomlin v. Kelly, 1 Wash. 190; Wortham & Co. v. Smith & als, 15 Grat. 487, 492-'3, 496-'7.)

2, That the promise is *implied*, merely from the making of the account, and is *not express*; the limitation upon every express promise, (not under seal,) being *five years*. (Beall v. Edmondson, 3 Call. 514; Brooke v. Shelby, 4 H. & M. 266.)

It has been thought by some, inasmuch as the statute requires a promise to take the case out of the statute to be *in writing*, &c., (V. C. 1873, c. 146, § 10), that such express promise will not suffice, if it be *by parol* only; but this view omits to consider the fact that the limitation is applicable only to *implied promises*, and not to such as are express; and that the express promise merges the implied, agreeably to the maxim *expressum facit cessare tacitum*. (2 Th. Co. Lit. 57-'8, 241; Broom's Max. 505.) Moreover, if this idea should prevail, a promissory note, or even a bond taken for such store-account, would be barred by the *lapse of two years*; that is, by the same time as the original cause of action, (V. C. 1873, c. 146,

§ 10,) which would be inconvenient, and as it seems absurd.

The plea, therefore, to take advantage of this clause of the statute ought to state in the very words of the statute, that the cause of action was for *articles charged in a store-account*, and that the same, nor any part thereof, did not accrue within two years next before, &c. And the replication, supposing the plaintiff means to prove an *express promise*, that is, to deny that the promise is founded merely by *implication*, upon the making of the account, should traverse the plea in *common form*, by averring "that the said cause of action *was not for articles charged in a store-account*." If the plaintiff, on the other hand, proposes to insist that, although the promise was an *implied one*, yet the action was brought in due time, within the two years, he must traverse in *common form* the other part of the plea, averring that "the said cause of action *did accrue within two years* before the commencement of this suit."

Form of plea of the statute of limitations to a store-account.

V. C. 1873, c. 146, § 8.

Title of Court. Circuit Court of A. County, to wit:

Rules. ——— *Rules,* ———

<i>Commencement.</i>	David Debtor	And the said defendant, by his attorney,
	ada.	comes and says that the said supposed
<i>Statement of</i>	Charles Creditor.	cause of action in the said declaration
<i>matter of</i>		mentioned was for <i>articles charged in a store account</i> , and that the
<i>defence.</i>		same did not accrue to the said plaintiff at any time within two
<i>Conclusion.</i>		years next before the commencement of this suit. And this the
<i>Offer to verify.</i>	said defendant is ready to verify.	P., p. d.

Formal defence omitted pursuant to V. C. 1873, c. 167, § 29.

Actio. non and *prayer of judgment* omitted pursuant to V. C. 1873, c. 167, § 25.

2^d. The Several Parts of a Plea.

For the parts of which every plea consists, reference is made to page 635 & seq.

3^d. The Replication.

The replication is the answer which the plaintiff makes to the defendant's plea, either by traversing, or by confessing and avoiding it. If there are several pleas, as by statute there may be, as we have seen, (V. C. 1873, c. 167, § 24); or if there are several defendants, and severing in their defence, they file several pleas, as at common law they may, the plaintiff may give an *answer to each*, but only *one answer*. The original rule of *singleness*, as to the replication and

subsequent pleadings, is in no wise relaxed. In response to the declaration the defendant may plead as many several matters of *law or fact* as he may deem necessary; but in the subsequent stages of the altercation, whilst he may either demur in law, or answer in point of fact, as he pleases, he cannot *do both at the same time*; but he may first demur, and when the court *intimates* an opinion adverse to his demurrer, without waiting for a judgment to be *formally entered* upon it, he may, with the leave of the court, which is always conceded as of course, withdraw his demurrer, and answer in point of fact.

The answer by way of replication may be either by way of *traverse*, or by way of *confession and avoidance*.

There are two forms of traverse by way of replication, namely, *common traverse*, that is, a traverse in the very terms of the allegation traversed, and a *traverse de injuria, &c.* Of the *common traverse* we have seen something before. Denying categorically some material averment contained in the plea, it always *tenders issue* (by the phrase, "and this the said plaintiff prays may be inquired of *by the country*"); and as it denies in the terms of the allegation, if those terms are affirmative, the traverse is negative; and if the terms are negative, the traverse is affirmative. (St. Pl. 154; Id. (Tyler's Ed.) 167.)

The parts of a replication, of whatever character, are as follows: (1), *Title of the court and rules* at which filed; (2), *The commencement*, including the *precludi non*, save in replications by way of *estoppel*, which have a commencement peculiar to themselves); (3), *The body of the replication*, or its substance; and (4), *The conclusion*, including the *offer to verify* and the *prayer of judgment*, if new matter is alleged, or if the replication is by way of traverse, a *tender of issue*.

FORM OF REPLICATION BY WAY OF COMMON TRAVERSE TO A PLEA OF
THE STATUTE OF LIMITATIONS.

Title of Court. Circuit Court of A. County, to wit:

Rules. ——— Rules, ———

Commencement. Charles Creditor

And the said plaintiff says that [*by reason of anything in the said plea*

Precludi non.

vs.

alleged, he ought not to be barred from having or maintaining his action aforesaid against the said defend-

David Debtor.

*Statement of
matter of
replication.*

ant, because he says that] the said cause (or causes) of action in the said declaration mentioned did accrue *within five years* next before the commencement of this suit, in manner and form as the said plaintiff hath above complained. And this he prays may be

Conclusion.

Tender of issue. inquired of by the country.

G., p. q.

The *precludi non* may be omitted wherever the plaintiff proposes by his replication to maintain *the action*, that is, the *whole action*. (V. C. 1873, c. 167, § 25; St. Pl. 400.) The prayer of

judgment (in a replication by way of confession, &c.,) may be omitted wherever the *precludi non* is not required. (V. C. 1873, c. 167, 25.)

The *precludi non*, and the prayer of judgment, (when the replication is by way of confession, &c.), must always be employed when the replication does not maintain the *whole action*, whether it be because the plea does not go to the whole, or because, if it does, the replication answers only a part thereof.

FORM OF REPLICATION BY WAY OF COMMON TRAVERSE TO A PLEA OF
STATUTE OF LIMITATIONS TO A STORE-ACCOUNT.

Title of Court. Circuit Court of A. County, to-wit:

Rules.

Rules, ———

<i>Commencement.</i>	Charles-Creditor	And the said plaintiff comes and says,
<i>Statement of</i>	vs.	that the said cause of action in the said
<i>matter of</i>	David Debtor.	declaration mentioned, <i>was not for arti-</i>
<i>replication.</i>		<i>cles charged in a store-account</i> , in manner and form as the said
<i>Conclusion.</i>	defendant hath in his said plea alleged.	And this he prays may
<i>Tender of issue.</i>	be inquired of by the country.	C., p. q.

The *precludi non* omitted, pursuant to V. C. 1873, c. 167, § 25.

The other mode of traverse, which occurs in the replication and in no other part of the pleading, is the traverse *de injuria sua propria, absque tali causa*, or (as it is more compendiously called,) the traverse *de injuria*. It always *tenders issue*, and therein resembles the *common traverse*, and indeed all traverses; but, on the other hand, it differs from a common traverse (like many of the general issues) in denying *in general and summary terms*, and not in the words of the allegation traversed. It occurs in the *replication alone*, and in no other stage of the pleading, and in no other action but *trespass and trespass on the case*. In these it is the *proper* form where the plea consists merely of *matter of excuse*. But when it consists of *matter of title or interest* in the land, &c., or the *commandment* of another, or in short, of anything other than *matter of excuse*, the replication by way of traverse *de injuria* is generally improper. The traverse of any of these matters, that is, of title, interest, commandment, &c., should be in the *common form*; that is, in the words of the allegation traversed. (St. Pl. 163; Id. (Tyler's ed.) 179.)

In order to illustrate a replication by way of traverse *de injuria*, the student must suppose an action of trespass for *assault and battery*, to which defendant has pleaded, by *way of excuse* for the battery in question, that defendant first made an assault on him, and would have beaten him had he not immediately defended himself, as he did, and had a

lawful right to do, and in so doing necessarily *beat the plaintiff a little*, doing him no unnecessary damage; and these are the trespasses whereof the plaintiff complains. This plea is technically known as a plea of *son assault demesne*, the replication to which is by way of trespass *de injuria*, the form being as follows :

FORM OF REPLICATION DE INJURIA TO A PLEA OF SON ASSAULT DEMESNE

Title of court. Circuit Court of A. County, to wit:

Rules. ——— Rules, ———

<i>Commencement.</i>	Charles Creditor	And the said plaintiff comes and says,
<i>Statement of</i>	vs.	that as to the said plea by the said de-
<i>matter of</i>	David Debtor.	fendant last above pleaded in bar to the
<i>replication.</i>	said several trespasses in the introductory part of that plea men-	
	tioned, the said plaintiff says that the said defendant, at the said	
	time, when, &c., of his own wrong, and without the cause in his said	
	last-mentioned plea alleged, committed the said several trespasses	
<i>Conclusion.</i>	in the introductory part of that plea mentioned in manner and form	
<i>Tender of</i>	as the said plaintiff hath above complained. And this he prays	
<i>issue.</i>	may be inquired of by the country.	C., p. q.

Procludi non omitted pursuant to V. C. 1873, c. 167, § 25. Prayer of judgment does not occur, except where *new matter* is introduced, and even then is omitted (V. C. 1873, c. 167, § 25,) where the *procludi non* is not required. (1 Chit. Pl. 591.)

The replication, as already observed, may be not only by way of *traverse*, but also by way of *confession and avoidance*. Of such a replication an illustration is afforded in the case of a plea of *infancy*, to which the plaintiff replies *confirmation after age*; or of a plea of *release*, to which plaintiff replies *duress*. A replication by way of *confession and avoidance*, always introducing, as it does, new matter, concludes with a *verification*, in accordance with the general rule, that all pleadings containing new matter must so conclude, (St. Pl. 433; Id. (Tyler's Ed.) 378); and at common law it must have also a prayer of judgment. (St. Pl. 398; Id. (Tyler's Ed.) 347.)

4^d. The Rejoinder.

The defendant's response to the plaintiff's replication is denominated the *rejoinder*; and it is in general governed by the same rules as those which relate to pleas, with the additional qualities that it must support, and not *depart from* the line of defence adopted in the plea; and must be *single*, the statute allowing *duplicity* in no other pleadings but *pleas*. (1 Chit. Pl. 689; V. C. 1873, c. 167, § 24.)

The defendant may either demur to the replication, or plead to it by way of *traverse*, or by way of *confession and avoidance*, which indeed is true (with some exceptions) of

each one of the stages of the altercation after the declaration. (St. Pl. 138; Id. (Tyler's Ed.) 157.)

5^d. The Sur-Rejoinder.

The sur-rejoinder is the answer of the plaintiff to the defendant's rejoinder. It is subject to the same general rules as the replication. (1 Chit. Pl. 690.)

6^d. The Rebutter.

The rebutter is the defendant's response to the plaintiff's sur-rejoinder, and is subject to the same general rules as the plea and the rejoinder. (1 Chit. Pl. 690.)

7^d. The Sur-Rebutter.

The sur-rebutter is the answer of the plaintiff to the defendant's rebutter, and is governed by the same general rules as the replication and the sur-rejoinder. (1 Chit. Pl. 690.)

It seldom happens that the pleadings go so far as to a sur-rebutter, or indeed beyond the replication; nor are any names provided for the alternate altercations farther than the former.

By statute with us it is enacted, that the rules may be to declare, plead, reply, rejoin, or for other proceedings; they *shall be given from month to month.* (V. O. 1873, c. 167, § 4.)

4^o. The Issue.

The pleadings having been so conducted, (as is exemplified by the statement which has gone before), as to evolve some question either of fact or of law disputed between the parties, and mutually proposed and accepted by them as the subject for decision, the question so produced is called *the issue*, because it is at once *the result* and *the end (exitus)*, of the pleading. And it remains next to see how that issue is to be decided. (St. Pl. 24-'5, 124, 137, &c.; Id. (Tyler's Ed.) 59, 60, 148, 156 & seq; *Ante*, p. 548-'9 & seq, 552-'3 & seq.)

SECTION iii.

3^b. The Decision of the Issue.

The pleadings and issue being adjusted, and the issue entered upon the record, the next subject of consideration is the manner in which *the issue is decided*.

The *mode* with us of entering the *issue* on the record is so entirely divested of all that is artificial and superfluous as to be very sufficiently exemplified by the rule-book, (*ante*, p. 606,) to which the student is referred. See St. Pl. 76; Id. (Tyler's Ed. 111 & seq.

Before adverting to the modes of deciding issues, it will be expedient to explain some preliminary particulars connected therewith, so that the topics under this head will be, (1), These

certain preliminary particulars; and (2), The modes of deciding issues;

W. C.

1^o. Certain Particulars Preliminary to the Decision of the Issue.

These particulars relate to, (1), The arrangement of the court-docket, or list of causes to be heard, and the order of hearing them; (2), Continuances of such as the parties are not ready to try; (3), The removal of causes from one State court to another; and (4), The removal of causes from the State to the United States courts;

W. C.

1^d. The Arrangement of the Court-Docket, and the order of Hearing Causes; W. C.

1^o. The Arrangement of the Court-Docket.

Before every term of a circuit court, and every term of a corporation court designated for the trial of civil causes wherein *juries are required*, the clerk is directed to make out a docket of the causes pending, including—

(1), Cases of the commonwealth;

(2), Motions and actions, in the order in which the motions were filed, or in which the proceedings at rules in the actions were terminated, docketing together *as new cases* those not on the docket at the previous term.

2^o. The Order of Hearing Causes.

Under the control of the court, the clerk is to set the cases on the docket to certain days, (with a view to the definite summoning of the witnesses); and the docket is to be called, and the cases disposed of *in that order*, except that for good cause, the court may take up any case out of turn. (V. C. 1873, c. 173, § 1.)

2^d. The Continuance of Causes.

Issues made up, not at the rules, but at the term of the court, and writs of inquiry, are to be tried and executed *at that term*, unless the *plaintiff* shall *prefer* to continue the case, or the *defendant* shall *show good cause* for a continuance. (V. C. 1873, c. 167, § 46; Id. c. 173, § 6.)

In other cases, continuances may be granted to either party for good cause shown; such as the absence of a material witness, who has been duly summoned, &c.

In the first instance mentioned, the plaintiff has the option to proceed or not, because as to him the issue is just made up, and he may not be prepared to try it; and for this reason it is a general rule that whilst the person who tenders an issue must come prepared to sustain it, and cannot have a continuance without showing cause, he to whom it is tendered is always allowed an interval from rule-day to rule-day, or from term to term, according as it is pend-

ing at rules or in court, either to concert his answer, or to prepare for trial.

As a check upon the facility with which judges have sometimes granted continuances, it is enacted that any party asking the court to hear a case may, if the court refuse to hear it, have his application spread upon the record, with a statement of the facts in relation thereto, (V. C. 1873, c. 173, § 3); a provision which seems intended rather to operate upon the judge's fears of impeachment by the General Assembly, than with a view to any direct redress; although it may be designed as the ground-work for a writ of *procedendo*.

3^d. The Removal of Causes from one State Court to Another.

This in England is styled "*changing the venue*," the *vicinetum*, or neighborhood, that is, the *county* for the trial, either because the witnesses principally reside in another county, or because a strong popular prepossession unfavorable to one of the parties prevails in the county where the action was first *laid*. (St. Pl. 290-'91; Id. (Tyler's Ed.) 275.)

There may be in Virginia also, a necessity for changing the venue arising from predominant popular prejudice in the county where the suit is instituted, but no *express* provision is made in such case for the removal of the cause. The only removal contemplated by our statutes is from the corporation to the circuit court, and from one circuit court to another, which last may be supposed by implication to embrace *any proper cause* for removal, and amongst others, that of popular prejudice, endangering the fairness of the trial. See *Darmsdatt v. Wolfe*, 4 H. & M. 246; 2 Va. Cas. 88; *Reg. Gen.*; *Boswell v. Flockheart*, 8 Leigh, 364.

W. C.

1^o. When the Cause is pending in a *Corporation Court*.

The removal may be made by the corporation court itself to the circuit court having jurisdiction over the corporation, on the motion of any party to the cause, after twenty days' notice to the adverse party; or upon like motion, the circuit court, or the judge in vacation, after like notice of twenty days, may order the removal. V. C. 1873, c. 170, § 1; *Harrison v. Middleton*, 11 Grat. 527; *Kincheloe v. Tracewells*, Id. 587; *Va. & T. R. R. Co. v. Campbell*, 22 Grat. 437.)

2^o. When the Cause is pending in a *Circuit Court*.

On the motion of any party the cause may be removed, by order of the court, to any other circuit court, or to the court of the corporation for which the former circuit court is held; or the judge of such circuit court may make such order in vacation. And the order may be made by the court without motion or notice, when the judge is so situated as to render it improper, in

his judgment, for him to decide or preside at the trial of the cause, (V. C. 1873, c. 170, § 2); but in general, the petition and affidavit must specify the particular facts on which the application for a change of venue is founded; and those facts should be supported by the affidavits of disinterested individuals. (2 Va. Cas. 88; *Boswell v. Flockheart*, 8 Leigh, 364.)

In these cases of removal the parties are not subjected to the expense of a copy of the record; but the original papers are transmitted, together with copies of all rules and orders, and the cause is proceeded with as if it had originated in the court to which it is removed. (V. C. 1873, c. 170, § 3.)

4^d. The Removal of Causes from a State to the United States Circuit Court.

The occasions when, and the modes whereby, causes may be removed from the State courts to the United States circuit court, have been fully explained, *Ante*, p. 270, &c. See 2 Abb. U. S. Pr. 33 & seq; *Desty's Fed. Proced.* p. 58, § 639 & seq.

2^o. Modes of Deciding Issues.

Issues, it will be remembered, are either *issues in law*, arising on demurrer, or *issues in fact*. (St. Pl. 76, &c.; *Id.* (Tyler's Ed.) 113, &c.):

W. C.

1^d. Issues in Law.

Issues in law are decided always *by the court*. Previous to 1850, they might have arisen either upon *special* or *general* demurrer; special demurrer being for matter of form not affecting the real merits of the case, whilst general demurrer was for mistakes in pleading of a more serious and substantial kind. The general demurrer did not state the ground of objection, the special demurrer did, (whence its name), having been required to do so in England by the Stats. 27 Eliz, c. 5, and 4 Anne, c. 16 (St. Pl. 140-'41); *Id.* (Tyler's Ed.) 158), and formerly by corresponding enactments in Virginia; but no demurrer for matter of *mere form* is now admitted in Virginia, except as to pleas *in abatement*, which not being favored, are required to be *rigorously formal* in all respects. Those defects and imperfections in pleadings which formerly could be taken advantage of only by special demurrer, cannot now, with us, *be objected to at all*. The statute enacts that, "On a demurrer (unless it be to a plea in abatement), the court shall not regard any imperfection or defect in the declaration or pleadings, whether it has been heretofore deemed misleading or insufficient pleading or not, unless there be omitted something so essential to the action or defence that *judgment, according to law*

and the very right of the cause, cannot be given. No demurrer shall be sustained because of the omission in any pleading of the words, 'this he is ready to verify,' or 'this he is ready to verify by the record,' or 'as appears by the record;' but the opposite party may be excused from replying, demurring, or otherwise answering to any pleading which ought to have, but has not such words therein, until they be inserted." (V. C. 1873, c. 167, § 32. See *Ante*, p. 620.)

All demurrers then with us, (except as to pleas in abatement), must be for *matter of substance only*, and they are directed to be (as well as the *joinder* therein), in the briefest possible form, such as, "the defendant (or plaintiff) says that the declaration (or plea, &c.) is not (or is) sufficient in law." (V. C. 1873, c. 167, § 31.)

It will be remembered, that upon a demurrer no objection can be noticed unless it appear *in the record*, either on the face of the preceding pleadings, or in the writ, or some specialty made a part of the record by *oyer*. (1 Chit. Pl. 704-'5; *Sacheverell v. Froggatt*, 3 Saund. 366, n (1).)

2^d. Issues in Fact.

The common law afforded *four methods* of ascertaining or trying *questions of fact*, namely, (1), By jury; (2), By the court; (3), By wager of law; and (4), By wager of battle. As to the several other modes of trial enumerated by Mr. Stephen, after Blackstone and other writers, (St. Pl. 77; *Id.* (Tyler's ed.) 114,) they are *not modes of trial*, but *modes of proof*. The cause is manifestly *not tried* by the *record* in the same sense in which it is tried by a jury or by the court. Nor in like manner is it *tried by certificate*, nor *by witnesses*, nor *by inspection*.

The two last modes of *trial* named above, namely, by *wager of law*, and by *wager of battle*, have never been in use in Virginia, and are considered as repealed by that provision in our Bill of Rights (Va. Const. 1869, Art. I, § 13,) which declares that "in controversies respecting property, and in suits between man and man, *the trial by jury* is preferable to any other, and ought to be held sacred." Both these ancient methods of trial have been abolished in England by statute, *wager of battle* by 59 Geo. III, c. 46, (in A. D. 1819,) induced by the case of *Ashford v. Thornton*, (1 B. & Ald. (4 E. C. L.) 405); and *wager of law* by 3 & 4 Wm. IV, c. 42, (A. D. 1834.) The only two modes of trial, therefore, at present existing, whether in England or in Virginia, are:

- (1), Trial by jury;
- (2), Trial by the court.

But, notwithstanding what Blackstone and Stephen denominate *modes of trial*, by record, certificate, inspection,

and witnesses, are *modes of proof*, and not of *trial*; and although trial by wager of law and wager of battel no longer exist, it will yet be expedient to explain the nature of each of them under the general heads of, (1), Modes of trial, erroneously so called; (2), Modes of trial abolished or ceased to exist; and (3), Existing modes of trial;

W. C.

1°. Modes of *Trial, erroneously so called*; W. C.

1^t. Trial *by the Record*.

This mode of trial, or as we should say, *mode of proof*, applies to cases where, in any action, issue is joined upon the plea of *nul tiel record* (no such record), one party alleging and the other denying the existence of a record. The trial is not by a jury, but *by the court*, and the only admissible proof is the production of the record, or of a duly authenticated copy of it, unless indeed the record be destroyed, when secondary evidence of it may be admitted. (St. Pl. 101-'2; Id. (Tyler's ed.) 130; 3 Bl. Com. 331; Buck v. Trigg, 2 Wash. 215; Eppes v. Smith, 4 Munf. 466; Gee v. Hamilton & ux, 6 Munf. 32; Wood's Case, 4 Rand. 329; Greenesville Just's v. Williamson, 12 Leigh, 93; V. C. 1873, c. 172, § 11 to 14.)

2^t. Trial *by Inspection*.

Trial by inspection, as a *mode of proof*, occurs when the point or issue being evidently the *object of the senses*, the court, upon its own view, shall decide the matter in dispute. The trial, therefore, is *by the court*, and the inspection is only the *medium of proof* whereby the opinion of the court is determined. It applies as a mode of proof in several cases at common law, of which it will suffice to mention one, namely, where a plea of infancy is presented to a *contract of record*, in which case the fact of infancy must be established by the *inspection of the defendant's person* by the court. (Bl. Com. 331-'2; 1 Insts. Com. & Stat. Law, 495.)

3^t. Trial *by Certificate*.

Trial by certificate, or rather *proof* by certificate, is allowed in cases where the evidence of the person certifying is the only proper criterion of the point in dispute. The trial, however, in such case, is *by the court*, the certificate being like the record, the *medium of proof* only. The instances where the proof is by *certificate*, at common law, are enumerated by Blackstone, (3 Bl. Com. 333 & seq.); but none of these are applicable with us, nor is it believed that *any fact* is permitted to be proved with us *by certificate*, except it be the *authenticity* of a copy from a record, which is proved by the certificate of the clerk or other custodian of the record, (V. C. 1873, c.

172, § 5, 15, 16); or the publication of an order of publication, which may be proved by the *certificate* of the editor of the newspaper in which it is printed; but these are *collateral, not principal* matters. For the sake of illustration, one case may be mentioned where at common law a principal fact may be proved by certificate, namely, where in an action of dower, the heir denies that the widow claiming dower was ever lawfully married to the ancestor, and the issue is joined upon the averment *ne unques accouplé en loial matrimoine*, i. e. never accoupled to her alleged husband in *lawful matrimony*. The issue is tried *by the court*, but the only admissible proof is the *certificate* of the diocesan of the place where the parish church in which the marriage is alleged to have taken place is situated. (3 Bl. Com. 335; S. Pl. 102; Id. (Tyler's Ed.) 130.)

4^f. Trial by Witnesses.

The trial by witnesses is *by the court*; it is the *proof only* which is by witnesses. Proof by witnesses is the most common method of proof, whether the *trial* be by the court or by a jury. But the cases contemplated by what the text-writers inaccurately denominate *trial by witnesses*, are a few *very special ones*, where the court hears the witnesses instead of a jury, and determines *the fact*. The most prominent instance is in an action of dower, where the issue is upon *the death of the husband*; and it is said that if, upon hearing the testimony of the witnesses, the court is unable to *satisfy itself*, it may in its discretion, send the parties *to the country*, that is, to a jury. (St. Pl. 103; Id. (Tyler's Ed.) 131; 3 Bl. Com. 336.)

2^o. Modes of Trial abolished, or which have ceased to exist; W. C.

1^f. Trial by Wager of Law.

This, like *wager of battel*, is truly a *mode of trial*. It is founded upon a note-worthy tendency in English jurisprudence, to substitute *presumption* for *proof*; a tendency proceeding apparently from a settled distrust of human veracity, and of the possibility of arriving at the precise truth by means of a cross-examination, and the comparison of testimony.

Trial by *wager of law* is founded on the *idea* of the practical value of *character*. It supposes that in certain instances where no strong *prima facie* case is made against a defendant, if he can procure a number of his neighbors to attest his credibility, the *probability* of his being credible is so great that his denial of his liability shall suffice to repel it.

The most important and best established of the cases

where this mode of trial is applicable, is the issue of *nil debet*, arising in an action of *debt on simple contract*, and the issue of *non detinet*, in an action of *detinue*. In the declaration in those actions, as in almost all others, the plaintiff concludes, it will be remembered, by offering his *suite*, (of which the ancient meaning was *followers or witnesses*, though the words are now retained as a mere form,) to prove the truth of his claim. On the other hand, if the defendant, by a plea of *nil debet* or *non detinet*, deny the debt or detention, he may conclude by offering to establish the truth of such plea "*against the plaintiff and his suite in such manner as the court shall direct.*" Upon this, the court awards the *wager of law*. (See the form of such issue and award of trial. (Co. Ent. 119 a; Lil. Ent. 467; 3 Chitty's Pl. 954; Barry v. Robinson, 1 Bos. & Pul. N. R. 297; King v. Williams, 2 B. & Cr. (9 E. C. L.) 538); and the form of this proceeding, when so awarded, is that defendant brings into court with him *eleven of his neighbors*, (called *compurgators*), and for himself makes oath that he does not owe the debt, or detain the property as alleged; and then the eleven also swear that they *believe him to speak truth*; and the defendant is then entitled to judgment. (3 Bl. Com. 343; St. Pl. 103; Id. (Tyler's Ed.) 131-'2.)

It is to be observed with respect to this mode of trial, that though the defendant has thus the *privilege* of resorting to it, he is not *obliged* to do so. He is at liberty, if he pleases, to put himself *upon the country*, the trial by jury being a mode of decision always applicable to the same questions on which *law may be waged*, and the mode which, in fact, even at common law, is in *modern practice* always applied to them. (St. Pl. 103; (Tyler's Ed.) 132.)

The effect of the liability to have the general issue in these two actions determined upon a trial by *wager of law*, was to banish them from common use in England, so that few early precedents of either are to be found in the English books. The action of *debt on simple contract* was substituted in practice, for the most part, by *trespass on the case in assumpsit*, and the action of *detinue* by the action of *trespass on the case in trover*.

It will be remembered, that trial by *wager of law* is abolished in England by the statute 3 & 4 Wm. IV, c. 42; and that having never practically been in use in Virginia, it is understood to have been done away with by our first bill of rights. (Va. Const. 1869, Art. I, § 13.)

2^d. Trial by Wager of Battel.

This mode of *trial*, (for it is properly such) seems to have owed its original *primarily* to that tendency,

already observed upon, to substitute *presumption* for *proof*; and *secondarily* to the military spirit of our English ancestors, joined to a superstitious frame of mind; it being in the nature of an appeal to providence, under an apprehension or hope, (however presumptuous and unwarrantable), that heaven would give the victory to him who had the right. It seems to have been a usage common to all the Teutonic nations thus to decide all contests of right by the sword, distinct traces of it being found amongst the Germans not very long after the Romans first became acquainted with them, and also amongst the ancient Goths in Sweden. (3 Bl. Com. 337.)

This mode of trial was introduced into England among other Norman customs, by William the Conqueror; but was only used in *three cases*, one military, one criminal, and one civil. The first in the *court-martial*, or court of chivalry and honor; the second in *appeals of felony*; and the third, upon issue joined in a *writ of right*, the last and most solemn decision of the common law upon titles to real property. The reasons assigned for allowing it in this last case are: (1), The frequent complexity and obscurity of the facts involved in the *mere right of property*, which was in issue in the action; (2), The death of witnesses, or other defect of evidence, which in the lapse of time was liable to occur; and (3), The precedent afforded by the contest between David and Goliath! (3 Bl. Com. 337-'8.)

The last trial by battel that was waged in a *writ of right* (though there was afterwards one in the court of chivalry in 1631; and another in the county-palatine of Durham, in 1638), was in the 13th year of Queen Elizabeth, (A. D. 1571), of which a full account is given by Sir James Dyer (Lowe & als v. Paramour, 3 Dyer, 301 a), which, with many additional particulars derived from other sources, Blackstone has embodied in his commentaries, (3 Bl. Com. 338 & seq.) But although these were the last cases in which the trial by battel *actually took place*, the mode of trial was *invoked* so recently as 1818, in the case of Ashford v. Thornton, 1 B. & Ald. (4 E. O. L.) 405, and the combat did not occur, simply because the *appellant* (it was an *appeal for murder*), did not choose to accept the gage of battel; and thereupon, by statute, 59 Geo. III, c. 46, *wager of battel* was abolished.

This mode of trial never practically existed in Virginia, and is generally conceded to have been abolished by the effect of the Bill of Rights of 1776. (Va. Const. 1869, Art. I, § 13.)

3°. Modes of Trial still Subsisting; W. C.

1°. Trial by the Court.

The court, as we have seen, tries all matters which are to be ascertained by the *record*, by *inspection*, by *certificate*, and by *witnesses*, in the peculiar sense intended in this connection and already explained, (*Ante*, p. 679). In all other *common law causes* disputed facts are ascertained by a jury, always at common law, and with only a few exceptions, by statute.

2^d. Trial by Jury.

In Virginia, and generally in these States, we are so accustomed to juries of *twelve men* that we are apt to lose sight of the fact that, whilst that was a favorite number of the common law, in which Lord Coke finds surprising virtue, and ample sanction in the fact that there were twelve apostles, twelve tribes, twelve stones, &c., (3 Th. Co. Lit. 459,) yet it is not a *necessary* number; and even in England, whilst *writs of right* were in use to recover lands, the issue in that sort of proceeding was always to be tried by *wager of battel*, (until that was abolished,) or at the option of the tenant by the *grand assize*, which is a jury of *sixteen persons*, (*Ante*, p. 340,) chosen in a peculiar manner. This improvement in the law originated in the time of Henry II, (the only mode of trial previously allowed in a *writ of right* being by *wager of battel*), and Blackstone conjectures that it was adopted upon the recommendation of Glanvil, who was Henry's chief justiciary. (3 Bl. Com. 341, 351; St. Pl. 101, n (14); Id. (Tyler's ed.) 129.)

But the great and favorite agency upon which the common law relies to determine contested facts is, a *jury of twelve men*, *liberos et legales homines*, as they are fondly denominated by the old writers. And it now remains to trace the proceedings in the trial by jury, *per pais*, or by *the country*, as it is also called.

In order to get a more comprehensive view of the subject than can be here presented, the student is *requested* to read Blackstone's chapter upon *trial by jury*, (3 Bl. Com. 349 & seq,) and Mr. Stephen's exposition of proceedings at *nisi prius*, (St. Pl. 78 & seq; Id. (Tyler's ed.) 115 & seq.)

It is proposed now to advert to some practical topics, which it is hoped will develope our own law upon this constantly recurring and most important mode of trial. This will be done under the heads following:

- (1), The mode of constituting and summoning juries in Virginia;
- (2), The proceedings before the jury;
- (3), The verdict;
- (4), Several incidents which may attend the trial; and,

(5), The modes of avoiding the effect of a verdict;
W. C.

1^a. The Mode of *Constituting and Summoning Juries*.

The discussion of the mode of constituting and summoning juries demands the exposition of, (1), The qualifications of jurors; (2), The persons exempt from jury service; (3), When exceptions to a juror may be taken; (4), The mode of summoning jurors; (5), The waiver of a jury, or the number reduced by consent; (6), The mode of paying jurors; (7), Frauds connected with jury service, and neglect of the officer; and (8), Rules of conduct as to jurors.

W. C.

1^a. The Qualifications of Jurors.

The Virginia Constitution of 1869 provides, (Art. III, § 3), that "all persons entitled to *vote and hold office*, and none others, *shall be eligible to sit as jurors*;" and the statute in pursuance thereof enacts, (V. C. 1873, c. 158, § 1), that "all male citizens, *twenty-one years of age*, and *not over sixty*, who are entitled to *hold office* under the constitution and laws of this State, *shall be liable to serve* as jurors, except as hereinafter provided," (Sand's Case, 21 Grat. 8, 71); and a party is not the less qualified to be a juror if he possesses the constitutional qualifications of a vote, because he has not been registered and has not voted. (Craft's Case, 24 Grat. 602.)

2^a. Persons exempt from Jury service.

The persons exempt from jury service are the governor and lieutenant-governor of the State, practising attornies, licensed practising physicians, officers of any court, telegraph-operators actually engaged in any office, professors, tutors, and pupils of public seminaries of learning, ministers of the gospel, and a number of other persons. (V. C. 1873, c. 158, § 2; Id. c. 22, § 2, 3.)

3^a. When exceptions to a juror may be taken.

On motion of either party, the court shall examine *on oath*, (on the *voir dire* or *vrai dire*, to speak truly, as the technical phrase is), any person who is called as a juror in the cause to know whether he is related to either party, or has any interest in the cause, or has expressed or formed any opinion, or is sensible of any bias or prejudice therein; and the party objecting to the juror may introduce any other competent evidence in support of the objection; and if it shall appear to the court that the juror does not stand indifferent, another shall be drawn or called; and placed in his stead for the trial of that cause. But no exception is

to be allowed against any juror after he is sworn upon the jury, on account of his age or other legal disability, *unless by leave of court*. And so also, it is enacted that no irregularity in any writ of *venire facias*, or in the drawing, summoning, returning or impannelling of jurors, shall be sufficient to *set aside a verdict*, unless the party making the objection was injured *by the irregularity*, or unless the objection was made *before the swearing of the jury*. (V. C. 1873, c. 158, § 19 to 21; Booth's Case, 16 Grat. 519; Parsons v. Hooper, 16 Grat 64.)

4^b. Mode of Summoning Jurors; W. C.

1^a. General Juries; W. C.

1^k. Mode of *Designating Persons from whom jurors are to be taken*.

The judge of each county and corporation court is required *annually*, at the May or June term of his court, to prepare a list of such inhabitants of the county or corporation not exempt from jury service, as he shall think well qualified to serve as jurors, being persons of sound judgment, and free from legal exception; including not less than one for every one hundred inhabitants of each magisterial district or ward, so that the whole number shall be at least one hundred, and not exceeding three hundred. This list the clerk is to keep, subject only to the inspection of the judge, who may add thereto the names of persons liable to serve, or strike off the name of any person *convicted* of any scandalous offence, or *guilty* of any gross immorality. The names being written on separate papers or ballots, are to be rolled up so as not to be visible from the out-side, and to be as near alike as possible, and kept in a secure box by the clerk, which is to be opened only upon the order of the judge. (V. C. 1873, c. 158, § 3 to 5.)

2^k. Mode of *Selecting the Jurors to be summoned* for any Circuit, County, or Corporation Court.

They are to be selected for each term (except in cases of felony), thus: the clerk of every county or corporation court, *at least ten days* before any term of a court at which a jury may be wanted, is required to issue a writ of *venire facias* for sixteen jurors, or a greater number if the court where they are to serve shall so order, to attend on the first, or such other day of the court as it shall appoint; the clerk of the circuit court notifying the clerk of the county or corporation court in writing, *twenty days* at least before their attendance is required, how

many jurors are wanted, and of the time and place at which they are to attend. It is then the duty of the clerk of the county or corporation court, *not less than seven, nor more than ten days* before the jurors are required, in the presence of the judge, if practicable, if not, of the commonwealth's attorney, or one of the commissioners in chancery of the *circuit court* of the county or corporation, to cause the proper number of jurors to be drawn from the box, whose names are to be inserted in the writ of *venire facias* already issued, and the writ delivered to the proper officer, whose duty it is to summon each juror, *at least three days before* he is required to attend. And if in drawing the ballots, any one bears the name of a person exempted by law, or known to be unable, by reason of sickness, absence or other cause, to attend as a juror, or who has been stricken from the list, another shall be drawn in his stead. And no one who has actually attended and served as a juror, shall be liable to be drawn again, during the same year, unless all the other persons whose names are in the jury-box, have also been drawn to serve during such year. (V. C. 1873, c. 158, § 7 to 11.)

3*. Mode of *Selecting Jurors for each Case.*

From the jurors summoned and attending, those required for the trial of causes are *selected by lot*. (V. C. 1873, c. 158, § 13.). And when by reason of challenge or otherwise, a sufficient number of jurors cannot be had for the trial of any case, the court shall cause the jurors to be returned from the bystanders, or from the county or corporation at large, by means of a *venire facias*, in which shall be inserted such names as the judge shall furnish, unless he shall think fit to dispense with a list of names. (V. C. 1873, c. 158, § 17.)

Any court may, during term, issue writs of *venire facias* for additional jurors if needed, to be summoned from a list furnished by the judge. (V. C. 1873, c. 158, § 12.)

2^d. Special Juries.

A *special jury* may be allowed by any court, to be formed as follows, viz: A panel shall be made of twenty qualified jurors, to be summoned from a list to be furnished by the judge of the court, upon an order made for the purpose, from which panel sixteen shall be chosen by lot (either designating the sixteen to be taken or the four to be excluded; (Bristow's Case, 15 Grat. 634); and then the parties, beginning with the

plaintiff's attorney, shall alternately strike off one until the number is reduced to twelve, which number shall compose the jury for the trial of the case. (V. C. 1873, c. 158, § 23.)

5^b. Waiver of a Jury, or the Number Reduced by Consent.

In any *civil case*, unless one of the parties demand a jury, the whole matter of law and fact may be heard and determined, and judgment given *by the court*. And by consent of parties, entered of record, the jury may consist of *seven*, or even of three. In the latter case the plaintiff is to select one person, eligible as a juror, the defendant another, and the two so selected a *third*, who shall be considered a jury in the case, taking the oath of jurors, and any two concurring shall render a verdict under the instruction of the court in like manner and to the like effect as a jury of twelve. (V. C. 1873, c. 158, § 36.)

6^b. Mode of Paying Jurors.

Jurors in *civil and misdemeanor* cases are paid one dollar for each day of actual attendance; in cases of misdemeanor out of the State treasury; and in civil cases out of the treasury of the county or corporation. But if the juror, although he attend, *does not serve* on any jury he is paid but fifty cents, and if he depart without leave of court he is to have nothing. (V. C. 1873, c. 158, § 26 to 31.)

7^b. Penalties for Frauds connected with Jury-Service and Neglect of Officer.

For *any neglect* by any officer connected with the drawing or summoning of jurors, a fine not exceeding twenty dollars may be imposed by the court. (V. C. 1873, c. 158, § 22.)

For *any fraud* in any way in the drawing of jurors, the party guilty is liable to a fine not exceeding five thousand dollars. (V. C. 1873, c. 158, § 32.)

8^b. Rules of Conduct as to Jurors; W. C.

1^a. No person is to serve as a juror, except in trials for felony, at any term of the court, during which any cause of his to be tried by a jury, shall have been or is expected to be tried. (V. C. 1873, c. 158, § 38.)

2^a. A juror knowing anything relative to the fact in issue shall disclose the same in open court. (V. C. 1873, c. 158, § 38.)

3^a. After a jury has been impannelled, no sheriff or other officer shall converse with or permit any one else to converse with any juror unless by leave of the court.

(V. C. 1873, c. 158; Philips' Case, 19 Grat. 534; Crim. Synops. 263.)

2^d. Proceedings before the Jury; W. C.

1^a. The Statement of the Cause to the Jury.

The practice is for the counsel of that party who has the right to open and conclude the cause (usually the plaintiff), to state the general nature of the action and the issue to be tried very briefly, but in a manner so perspicuous as to enable the jury to discern the point or points involved in the case, and to understand clearly the drift and application of the evidence. The opposing counsel then makes a similar statement, and his object also ought to be to present to the jury as distinctly as possible the points which they will have to determine. A long opening statement on either side is to be deprecated, and especially ought all remarks upon testimony not yet submitted to be forborne. Brevity is by no means to be lost sight of; but if the statement is to be of any use at all, it is not to be so brief as to be obscure. Counsel should labor to present the case clearly to the jury in the shortest possible compass; but it ought to be *presented clearly*, as to the salient points to which the attention of the jury is to be particularly directed in the investigation which is to follow.

2^b. The Evidence to be Submitted to the Jury.

The doctrines touching evidence are of too great extent and variety to be treated here at length. Nothing can be presented but a very brief outline of some of the most prominent topics, rather with a view to prompt the future inquiries of the student than to convey present information for practical use. What is to be said on the subject will be disposed under the following heads, namely, (1), The modes of procuring the attendance of witnesses; (2), The objections to witnesses; (3), The oath of witnesses; (4), The mode of examining witnesses; (5), The rules of evidence; (6), Bills of exceptions; and (7), The considerations which ought to regulate the application of the evidence to the cause; W. C.

1^a. The Modes of Procuring the Attendance of Witnesses.

The usual mode of obtaining the attendance of a witness is by means of a summons called a *subpoena*, which is issued upon the demand of either party, by the clerk of the court, commanding the proper officer to summon the witness whose attendance is desired to attend at the time and place indicated, to give evidence before the court, expressing on whose behalf,

and in what case, or about what matter the witness is to attend. (V. C. 1873, c. 172, § 26; Id. c. 166, § 2.) And when it appears by affidavit, that a writing or document in the possession of a person, not a party to the controversy, is material and proper to be produced, *the court, or the judge in vacation, may order the clerk* to issue a *subpœna duces tecum*, to compel such production at the time and place to be specified in the order. (V. C. 1873, c. 172, § 27.) The ordinary *subpœna* is obtained at the pleasure of the party; the *subpœna duces tecum* only by order of the court or judge.

If the witness, after being served with such summons, fail to attend to give evidence, or to produce such writing, the court, on proof that there was paid to him, (if it was required by endorsement on the process,) a *reasonable time* before he was required to attend, the allowance of one day's attendance, and his mileage and tolls, shall, after a service of a notice to, or rule upon him, to show cause against it, (if no sufficient cause be shown against it,) fine him not exceeding \$20, to the use of the party for whom he was summoned; and the court may proceed by *attaching* his person to compel him to attend and give his evidence; and the witness shall moreover be liable to any party aggrieved for damages. (V. C. 1873, c. 172, § 28; Gr. Ev. § 314 & seq; Id. § 319.)

And if he attend, and yet refuse to be sworn, or to give evidence, or to produce any writing required, the court may commit him to jail, to remain until he shall, in the custody of the jailor, give such evidence or produce such writing. (V. C. 1873, c. 172, § 29.)

Provision is also made for taking the depositions of witnesses, to be read, however, only in case it shall appear at the trial that the witness cannot reasonably attend in person; the causes which shall suffice to excuse the personal attendance being sedulously specified. (V. C. 1873, c. 172, § 35 to 38; Gr. Ev. § 320 & seq.)

There is another mode of obtaining the attendance of witnesses in civil cases, which, however, is very rare. It is by means of a writ of *habeas corpus ad testificandum*, where the witness is in custody of the law, and is not at liberty to obey a *subpœna*. This writ is grantable at discretion, on motion in open court, or by the judge at chambers, upon affidavit stating the nature of the suit, and the materiality of the witness. (1 Gr. Ev. § 312; 2 Tidd's Pr. 809.)

2^d Objections to Witnesses.

Objections to witnesses may be to (1), Their competency; and (2), Their credibility;

W. C.

1^k. Objections to the Witness' Competency.

For the most part, objections to testimony relate to its *credibility*, but experience has proved it to be necessary to the ends of substantial justice, that some kinds of evidence should be *uniformly excluded* as always incompetent. Whether a witness is incompetent by law to testify is a question to be determined *by the court*; whether, when he has testified, he is to be believed, and to what extent, is submitted *wholly to the jury*. (1 Phil. Ev. 2; Ross v. Gill & ux, 1 Wash. 87, 90; Blincoe v. Berkeley, 1 Call. 412; Fisher v. Duncan, 1 H. & M. 563; Martz v. Martz, 25 Grat. 363, 367.)

Let us note, (1), The causes of the incompetency of witnesses; and (2), The time for making objections to their competency;

W. C.

1^l. The Causes of the Incompetency of Witnesses.

The tendency of late years has been not a little to relax the rigorous doctrines of the common law touching competency, and to refer objections rather to the witness' credit. It will be expedient, however, to enumerate the several classes of persons who are incompetent at common law, and to take notice as we proceed of the modifications which have been wrought. Witnesses are, at common law, incompetent by reason of (1), Being *parties to the record*, or the husbands or wives of parties; (2), Defect of *understanding*; (3), Defect of *religious belief*; (4), *Infamy*, in consequence of the conviction of crime; (5), Interest in the result, &c.;

W. C.

1^m. Witnesses Incompetent by reason of being *Parties* to the *Record*, or the *Husbands or Wives* of Parties.

The general rule of the common law is that a *party to the record* in a civil suit, who has any interest therein, although it be only to the extent of liability for costs, cannot be a witness, either for himself or for a co-sutor in the cause. Nor can such party be compelled, in trials *by jury*, to give evidence for the opposite party against himself. This rule of the common law is founded, not solely in consideration of interest, but partly also in the general expediency of withholding temptations to perjury.

(1 Gr. Ev. § 329; 4 Phil. Ev. 45 & seq; Murphy v. Carter, 23 Grat. 485.)

And as the parties to the record cannot themselves be witnesses on either side of the controversy, so neither can their consorts, respectively. Neither the husband nor the wife is admissible as a witness in any cause in which the other is a party; a rule of exclusion founded partly on the identity of their legal rights and interests, and partly on principles of public policy, which lie at the basis of civil society; for it is essential to the happiness of social life, that the confidence which ought to subsist between husband and wife should be sacredly cherished in its most unlimited extent, not only during the continuance of the coverture, but as to facts learned from the consort even after its termination also. (1 Gr. Ev. § 334 & seq; 1 Phil. Ev. 69 & seq.)

Husbands and wives are, with us, still incompetent, as at common law (V. C. 1873, c. 172, § 22,) to testify in civil suits for or against each other; but the *parties to the record* are, to a great extent, relieved of their disability to be witnesses. The revisal of 1849, following 3 & 4 Vict. c. 26, enacted that no merely formal party, and especially no trustee, executor, or other fiduciary, shall be incompetent as a witness by reason only of his being a party, or of his being liable to costs; but if liable to costs he shall not be competent, unless some person undertake to pay the same. (V. C. 1873, c. 172, § 18, 19.) And for many years it has been allowed in Virginia to propound written interrogatories to any party, and to compel him to answer them, and also to produce any book of accounts or writing in his possession, nearly after the manner of a bill of discovery in equity, (V. C. 1873, c. 172, § 44 to 46); but by act of 1865-'6, and subsequent acts, it is provided that a party to a suit or proceeding, or one on whose behalf it is prosecuted or defended, if otherwise competent to testify, and subject to the rules of evidence and of practice applicable to other witnesses, shall be competent to give evidence on his own behalf, and shall be competent and compellable to attend and give evidence on behalf of any other party to the action or proceeding, with *certain exceptions*. (V. C. 1873, c. 172, § 28.) Those exceptions relate to the husband and wife, as already mentioned, and to the case where

one of the original parties to the transaction which is the subject of investigation is dead or insane, or incompetent to testify by reason of any infamy or other legal cause, when the other party is not competent, unless he is first called to testify by the adversary; or unless some one having an interest adverse to the incapable party has previously testified to some fact occurring before the inability accrued; or unless the transaction in question was with an *agent*, who is yet alive and competent to testify, or with *partners or other joint contractors*, some of whom, who were *personally concerned* in the transaction, yet survive. (V. C. 1873, c. 172, § 22; Acts 1876-'7, p. 184, c. 198.)

Under this very radical statute it is held that a party to the *suit* is not excluded from testifying merely because the adversary party thereto is dead, or insane, or otherwise incompetent; but in order that he may be disqualified, it must be one of the original parties to the *contract or transaction* under investigation who has died, or become insane or incompetent. The exception applies to the parties to the transaction, and not to the parties to the suit. Hence, notwithstanding one of the parties to the *transaction* be dead, &c., still the exception does not, it would seem, exclude a party to the suit from testifying to independent facts, as to which his testimony, if untrue, could be rebutted by others as readily as by the deceased. (*Martz v. Martz*, 25 Grat. 364-'5; *Field v. Brown*, 24 Grat. 84-'5.) But this last conclusion is rendered more than doubtful by the more recent case of *Mason v. Wood*, 27 Grat. 786.)

2^m. Witnesses Incompetent by Reason of *Defect of Understanding*.

It is too obvious to need illustration, that persons incapable of comprehending the nature and obligation of an oath, ought not to be admitted as witnesses. Nor is it material from what cause the defect of understanding may proceed, nor whether it be temporary or permanent. Whether the party be an idiot, or only occasionally insane, or intoxicated, or the defect arises from mere immaturity of intellect, as in the case of children; as long as the deficiency of understanding exists, be the cause of what nature soever, the person is not admitted to testify. But if the cause be temporary, and a lucid interval occurs, or the mental weakness

be otherwise removed, the incompetency ceases. (1 Greenl. Ev. § 365; 1 Phil. Ev. 3 to 6.)

Persons deaf and dumb from birth were formerly supposed to be necessarily incapable of acquiring ideas, and, therefore, to be destitute of understanding. This is ascertained to be far from being universally true; but as such persons require very careful and extraordinary cultivation in order to develop their faculties, the presumption that they are mentally deficient is still so far operative as to devolve on the party producing the witness the burden of showing that he is of sufficient understanding. If he can write, that is considered the better method of communicating with him; otherwise, he is permitted to testify by signs. (1 Greenl. Ev. § 366.)

For children no precise age is fixed when they shall be deemed capable to testify. Their admission as witnesses is determined not by years, but by their intelligence, and their capacity to comprehend the nature and obligations of an oath. At and above the age of fourteen, sufficient discretion and understanding is presumed. Under fourteen it must be proved. The examination, in order to test the child's capacity, is made by the judge at his discretion; and in no case can the child's statement of facts be proved as evidence, when the court deems the child himself inadmissible for want of intelligence. When the child appears to be not yet sufficiently instructed in the nature of an oath, the court may in its discretion postpone the trial, that such instruction may be given, although it has been doubted if a similar course can be pursued with an adult witness. Upon these principles, it is not unusual to receive the testimony of children under nine, and sometimes even under seven years of age, if they appear to be of sufficient understanding; and it has been admitted even at the age of five years. (1 Greenl. Ev. § 367; 1 Phil. Ev. 4 & seq; Rosc. Crim. Ev. 113 & seq.)

3^m. Witnesses incompetent by reason of *Defect of Religious Belief*.

It being an established rule that all witnesses who are examined upon any judicial inquiry, must give their evidence under the sanction of an oath, which is a religious and solemn appeal to God, and an imprecation of his just vengeance if the

witness is guilty of falsehood, the common law, very logically, will not permit one to be a witness who does not believe in a God, and a future state of rewards and punishments. (1 Greenl. Ev. § 368 & seq; 1 Phil. Ev. 7 & seq.) But the constitution of Virginia having declared that one's religious opinions or belief shall "in nowise affect, diminish, or enlarge" his "civil capacities," (Art. V, § 14), our courts hold that the necessary construction of the clause is that no person is incapacitated from being a witness on account of his real or professed religious opinions. (Perry's Case, 3 Grat. 632.)

4^m. Witnesses Incompetent by reason of *Infamy, in Consequence of the Conviction of Crime.*

Persons are incompetent as witnesses who have been guilty of those heinous crimes which men generally are not found to commit, unless when so depraved as to be unworthy of credit for truth. The basis of the rule is that such a person is morally too corrupt to be trusted to testify; and so reckless of the distinction between truth and falsehood as to render it improbable that he will speak the truth. As Chief Baron Gilbert remarks, the credit of his oath is over-balanced by the stain of his iniquity. The party, however, must have been legally adjudged guilty of the crime, and the record of his conviction is the sole evidence admitted of his guilt. (1 Greenl. Ev. § 372; 1 Gilb. Ev. (Lofft.) 256; Phil. Ev. 14, 19.)

What precisely are the crimes which render one thus infamous it is not easy to determine. The usual enumeration is treason, felony, and the *crimen falsi*; but the meaning and extent of the latter designation, which is derived from the Roman law, is not accurately defined. It has been adjudged that persons are rendered infamous, and therefore incompetent to testify, by conviction of forgery, perjury, subornation of perjury, suppression of testimony by bribery, or by conspiracy to procure the absence of a witness, or by conspiracy to accuse one of a capital offence, or by barratry. And hence it may be deduced, that the *crimen falsi* of the common law not only involves the charge of falsehood, but of falsehood or fraud, which may injuriously affect the administration of justice. (1 Greenl. Ev. § 373; 1 Phil. Ev. 17, 18.)

The party thus disqualified is still capable of

making an affidavit in *his own behalf*, in the course of legal proceedings; and if he were a subscribing witness to a deed, will, or other writing before his conviction, his hand-writing may be proved as though he were dead. (1 Greenl. Ev. § 374; 1 Phil. Ev. 19; *Dempsey v. Lawrence*, Gilm. 333; *De Lacy v. Antoine*, 7 Leigh, 449.)

The disability is in general removed at common law by, (1), Reversal of the judgment; and (2), Pardon; and by statute 9 Geo. IV, c. 32, (3). Suffering the punishment assigned by law to the offence. (1 Greenl. Ev. § 377, & n (3); 1 Phil. Ev. 23.) In Virginia it is enacted, that "except where it is otherwise expressly provided, a person convicted of *felony* shall not be a witness, unless he has been *pardoned or punished* therefor; and a person convicted of *perjury* shall not be a witness, although pardoned or punished." (V. C. 1873, c. 195, § 19.) It would seem, therefore, that with us it is only in case of felony, (which includes treason, V. C. 1873, c. 195, § 1), that suffering the prescribed punishment restores the convict to competency as a witness.

5^m. Witnesses Incompetent by reason of *Interest in the Result*.

The principle on which persons interested are rejected as witnesses is the same as that which excludes, at common law, the parties themselves, namely, the danger of perjury, and the little credit which experience ascertains to be generally due to such testimony in judicial investigations. This disqualifying interest, however, must be some legal, certain, and immediate interest, although it be ever so minute, either in the event of the cause itself, or in the record, as an instrument of evidence in support of his own claims, in a subsequent action. (1 Greenl. Ev. § 386; 1 Phil. Ev. 81.)

This principle of exclusion has, of course, shared the fate of that which related to parties, it being provided by statute that "no witness shall be incompetent to testify because of interest." (V. C. 1873, c. 172, § 21.)

There was formerly, with us, a sixth class of incompetent witnesses, namely, *negroes*, where a white person was a party. This disqualification was materially modified at the first session of the Virginia legislature after the abolition of slavery, and at the second session (in 1866-'7) it was abol-

ished altogether by enacting that "colored persons shall be competent to testify in this State, as if they were white." (V. C. 1873, c. 172, § 20.)

In England, and in many of these States, it is held that grand-jurors are not to be called upon to state what occurred before the grand-jury, except to a very limited extent, (1 Greenl. Ev. § 252; 1 Phil. Ev. 182); but this rule has never prevailed in Virginia. It seems to be the better opinion also, that judges of courts of record are incompetent to testify in their own courts at all, or to depose elsewhere to what passed before them in their tribunals. (1 Greenl. Ev. § 364; Reg. v. Gazard, 8 Car. & P. (34 E. C. L.) 595.)

2¹. The Time for making Objections to the Competency of Witnesses.

Objections to the competency of a witness ought, in general, to be taken before he is examined in chief, that is, by the party who calls him; and if the ground of incompetency were then known, the objection cannot avail after his testimony has been given. The election to admit the witness to testify, or to exclude him, must be made as soon as the opportunity to make it is presented; or else it is presumed to be altogether waived; and after the trial is ended it is always too late to make the objection. On the other hand, if the adversary was ignorant of the objection, and it is brought to light in the course of the trial, the witness' testimony will be stricken out, and the jury will be instructed wholly to disregard it. (1 Greenl. Ev. § 421.)

2². Objections to the Witness' Credibility.

We are to note under this head, (1), Who determines the credibility of witnesses; and (2), The modes of discrediting them;

W. C.

1¹. Who Determines the *Credibility of Witnesses*.

The jury ultimately determines the weight that is due to the testimony of witnesses, wherever jury trial prevails; but in England, and in those States where it is the practice for the court to sum up the evidence to the jury, and to expound the law of the case, it is unavoidable, or at least is unavoided, that there should be in the charge of the judge more or less of comment upon the *weight* of the testimony and its application, although it is agreed that such observations are addressed to the jury only for their consideration. They are not binding as a conclu-

sive exposition of the merits, and are entitled to no more importance than the jury, in the exercise of a sound judgment, thinks fit to give them. (*Carver v. Jackson*, 4 Pet. 80; *Magniac v. Thompson*, 7 Pet. 390; *Com'th v. Child*, 10 Pick. (Mass.) 252; 4 Phil. Ev. (Cowen, &c.) 774, n. 403.) In Virginia, where unhappily the practice seems never to have existed of such summing up of the evidence by the court, comments upon the weight and effect of the testimony on the part of the judge are regarded with extreme jealousy, and are generally a ground for reversing the judgment. (1 Rob. Pr. (1st ed.) 338; Bart. Pr. 214; *Baring v. Reeder*, 1 H. & M. 174; *Fisher v. Duncan*, 1 H. & M. 576-'7; *Moore v. Chapman*, 3 H. & M. 266; *Fowler v. Lee*, 4 Munf. 373; *McRae v. Scott*, 4 Rand. 465; *Berry v. Ensell*, 2 Grat. 338; *McDowell v. Crawford*, 11 Grat. 402.)

2^l. The Modes of Discrediting a Witness.

After a witness has been examined in chief, his credit may be impeached, not only by cross-examination, subject to the rules which control that branch of the inquiry, but also by (1), Disproving by other witnesses the facts stated by him; (2), Impeaching his general character for veracity; and (3), Proof of contradictory statements made by him. (1 Greenl. Ev. § 461 & seq; 1 Stark. Ev. 211 & seq; W. C.

1^m. Disproving by other Witnesses *the Facts stated by the Witness.*

If this can be successfully done, it of course effectually destroys the force of the witness' testimony. Even to disprove *in part* the facts stated by him tends more or less materially to impair the effect of what he has said in respect to particulars wherein he is not contradicted; for although it is illogical to conclude that a statement is wholly false because it is found to be untrue in some of its parts, yet such a state of things suggests almost necessarily a defect, either in the observation or in the memory of the witness, if it does not impeach his veracity. (1 Greenl. Ev. § 461; 1 Stark. Ev. 211.)

2^m. Impeaching the Witness' *General Character for Veracity.*

It is well settled that the credit of a witness on the score of a want of a character for veracity is to be impeached by *general evidence* only, and not by

evidence as to *particular facts* of misconduct not relevant to the issue; for that would load the inquiry with such an accumulated burden of collateral proof as would make the administration of justice impracticable; and besides, it would do infinite injustice to the witness, who, although he ought to be capable of defending his *general* character, cannot be prepared to defend himself against particular charges of which he has had no previous notice. (1 Stark. Ev. 211; 1 Greenl. Ev. § 461.)

The proper mode of examining the witness called to impeach another who has testified in the cause, is to inquire whether he knows the *general reputation* of the person in question among his neighbors and acquaintances; what that reputation is; and whether from such knowledge the witness would believe that person upon his oath. (1 Greenl. Ev. § 461; 1 Stark. Ev. 212.)

3^m. Proof of Contradictory Statements made by the Witness.

It is only in such matters as are relevant to the issue that the witness' contradictory statements can be shown; and before it can be shown that he has made such statements, he must, as a general rule, be first asked, in the case of verbal statements, as to the time, place, and person involved in the supposed contradiction. It is not enough to ask the general question, whether he has ever said so and so; because it may happen that upon the general question he may not remember having so said; whereas when his attention is directed to particular circumstances and occasions, he may recollect and explain what he has formerly said. (1 Greenl. Ev. 462 & seq; 1 Stark. Ev. 213 & seq; 4 Phil. Ev. (Cowen), 758, n 390.)

3^l. The Oath of the Witness.

An oath is a public and solemn invocation of the Supreme Being to witness the truth of what is about to be said. As administered in our courts, it is to the effect that the evidence about to be given "shall be the truth, the whole truth, and nothing but the truth, so help you God!" As the object is to bind the conscience of the witness, the precise form ought to be that which he holds to be binding, and which has the sanction of the usage of the country or sect to which he belongs. A Jew is sworn upon the Pentateuch, and *with his hat on*, and a Mahometan upon the Koran; whilst a Christian, or one who does not indicate a

preference for another form, is sworn upon the gospels; the witness, whilst the officer repeats the words of the oath, having his hand upon the book, and kissing it at the close as a sign of his assent to the oath. (1 Greenl. Ev. § 371; 1 Stark. Ev. 21-'2; Burr. Law Dict. Oath). If the witness has conscientious scruples against taking the oath in the usual form, he may make a solemn religious affirmation involving a like appeal to God for the truth of his testimony in any mode which he deems binding. (1 Greenl. Ev. 371; Bouv. Law Dict. Oath); and this is now with us confirmed by statute, which enacts that, "If any person required to take an oath shall declare that he has religious scruples as to the propriety of taking it, he may make a solemn affirmation, (it is usual to hold up his right hand in token of the invocation of the Deity), which shall, in all respects, have the same effect as an oath." (V. C. 1873, c. 12 § 5.)

4¹. The Mode of Examining Witnesses.

The judge may, in his discretion, when he deems it essential to the discovery of truth, order the witnesses to be separated, and that each shall be examined out of the hearing of the others. Such an order is rarely withheld when moved for or suggested by either party; and if a witness in violation of the order remains in court, even by mistake, it is in the discretion of the judge whether or not he shall be examined; the witness, whether examined or not, being liable to be punished for contempt of court in disregarding its order. (1 Greenl. Ev. § 432.)

The examination may be distributed under three heads, namely: (1) The examination in chief, or the direct examination; (2), The cross-examination; and (3), The re-examination;

W. C.

1². The Examination in Chief, or the Direct Examination.

In the direct examination of a witness it is not, in general, allowed to put to him what are called *leading questions*; that is, questions which *suggest to the witness the answer desired*. Thus a question embodying a material fact, which admits of an answer by a *simple negative or affirmative*, is not proper. Much less may the interrogatory assume facts to be proved which have not been proved, and answers to have been given which have not been given; but whilst in general such an argumentative course of interrogation is forbidden, the rule is sometimes re-

laxed, and leading questions are permitted, even in a direct examination, namely: (1), Where the witness appears to be hostile to the party producing him, or in the interest of the adverse party, or unwilling to give evidence, of all which the court must judge; (2), Where an omission in his testimony is evidently caused by want of recollection, which a suggestion may assist, as in the enumeration of a number of particulars, names of persons, dates, sums, &c.; (3), Where, from the nature of the case, the mind of the witness cannot be directed to the subject of inquiry without a particular specification of it, as when he is called to contradict another as to the contents of a lost letter, and cannot, without suggestion, recollect what it contained; (4), Where the witness is called to contradict another who has stated that, on a specified occasion, such and such expressions were used; and (5), Where the witness stands in a position necessarily adverse to the party calling him, as where the plaintiff examines the defendant himself, or *vice versa*. (1 Greenl. Ev. § 434, 435; 1 Stark. Ev. 169 & seq; Ram on Facts, 313 & seq. App'x.)

As to the witness' testimony being confined to *facts* in opposition to *opinions*; and to facts *within his own knowledge* and *relevant* to the issue; and the assistance he is allowed to derive to his memory from written *memoranda*; these and some other topics will be set forth under the subsequent head of *rules of evidence*, 5¹.

2^k. The Cross-examination.

The power and opportunity to cross-examine is one of the principal tests of truth in judicial inquiries, and it is certainly a most efficacious test. By this means the situation of the witness with respect to the parties and the subject of litigation, his interest, motives, inclination, and prejudices; his means of obtaining correct and certain knowledge of the facts to which he testifies; the manner in which he has used those means; his powers of discerning facts in the first instance; and his capacity for retaining and describing them, are fully investigated and ascertained, and submitted to the consideration of the jury, who have an opportunity of observing also the manner and demeanor of the witness,—circumstances which are often of as high importance as the answers themselves. (1 Stark. Ev. 186 & seq; 1 Greenl. Ev. § 446; Ram on Facts, 324 & seq. App'x.)

In general, where a *competent* witness is called and

sworn, the other party will, in strictness, be *entitled to cross-examine him*, though the party calling him *does not choose to examine him in chief*; unless he was sworn by mistake, or having been only asked an immaterial question, his further examination in chief was stopped by the judge. (1 Greenl. Ev. § 445; 1 Stark. Ev. 187.)

In respect to the tenor of the cross-examination, it must suffice to observe that greater latitude is usually allowed than in the examination in chief, in respect to leading questions, and as touching collateral facts tending to test the witness' willingness to speak truth; and that if, by an unskilful or unfortunate question, a fact be extracted which would not have been evidence upon an examination in chief, it then becomes evidence against the cross-examining party. (1 Stark. Ev. 188, 199.)

3*. The Re-examination.

A witness may be re-examined by the party who called him upon all the topics on which he has been cross-examined, thus giving an opportunity of explaining any new facts which have come out upon cross-examination; but as the object of re-examining a witness is to explain the facts stated by him upon cross-examination, the re-examination is of course to be confined to the subject-matter of the cross-examination. (1 Stark. Ev. 208 & seq; 1 Greenl. Ev. § 467; Ram on Facts, 349 & seq, App'x.)

5¹. Rules of Evidence.

Evidence is either, (1), Unwritten, or oral; or (2), Written;
W. C.

1¹. Unwritten, or Oral Evidence.

By unwritten or oral evidence is meant the testimony of witnesses given *viva voce* in open court, or reduced to writing before certain accredited functionaries, in the form of *depositions*, and certified by those functionaries to the court.

The topics to be discussed under this head may be stated thus, (1), Witness is to testify to facts, not opinions; (2), Witness must testify according to his own recollections; (3), Irrelevant evidence is excluded, and only material allegations are to be proved; (4), Doctrine touching the burden of proof; (5), The best evidence attainable must be produced; (6), Doctrine touching the admissibility of hearsay; (7), Doctrine touching matters of professional confidence; (8), Doctrine touching secrets of State; (9), Doctrine

touching admissions of parties ; (10), Doctrine touching circumstantial evidence ; (11), Doctrine as to the number of witnesses required ; and (12), Doctrine as to the introduction of parol evidence to affect that which is written ;

W. C.

1¹. Witness is to Testify to *Facts*, not to *Opinions*.

A witness is examined either as to facts simply, which he himself knows, or in some instances as to his own inferences from facts, or as to facts which he has heard from others. In ordinary cases the examination should be confined to *facts* which are within *his own knowledge*, and should not extend to any opinion or conclusion which he may have drawn from facts ; for those are to be formed by the jury, except, indeed, where the conclusion is an inference of *skill and judgment*. This rule is not to be understood as requiring a witness to speak with such certainty as to exclude all doubt in his own mind touching the fact to which he testifies, nor to forbid him to state it as it lies in his memory, of the accuracy of which the jury will judge. He can only testify to the identity of a person, or of a hand-writing, according to his belief, founded on his recollection of the person or hand-writing, and if he testifies falsely to his belief, he is guilty of perjury. (1 Greenl. Ev. § 440, 1 Stark. Ev. 173 & seq.)

But on questions of science, skill, or trade, and others of like kind, including questions of hand-writing, when the witness does not speak from actual recollection, but only from similitude to known specimens, persons of skill, called experts, may not only testify to facts, but are permitted to give their *opinions* in evidence, and the court must determine whether the witness is an expert. (1 Greenl. Ev. § 440 ; 1 Stark. Ev. 174 & seq ; Mendum's Case, 6 Rand. 704 ; Livingston's Case, 14 Grat. 592 ; Bird's Case, 21 Grat. 800 ; M. Railway Co. v. Kellogg, 4 Otto, 473.)

2¹. Witness must Testify according to *his own Recollections*.

Although a witness can testify only to such facts as are within his own knowledge and recollection, yet he is permitted to refresh and assist his memory by the use of a writing, memorandum, or entry in a book, whether made by himself or another, *provided* after inspecting it, he can, (1), Speak to the facts from his own recollection ; or (2), Can state

that he saw the paper while the facts were fresh in his memory, and remembers that he knew *then*, that they were therein correctly stated; or (3), Knowing the writing to be genuine because authenticated by his own hand-writing, he can on that ground swear positively to the fact. But where the witness neither recollects the facts, nor remembers to have recognized the written statement as true, and the writing was not made by him, his testimony, so far as it is founded upon the writing, is but hearsay, and is inadmissible. (1 Greenl. Ev. § 436, 437; Harrison v. Middleton, 11 Grat. 527.)

3^d. Irrelevant Evidence is excluded, and only material Allegations are to be Proved.

It is an established rule governing the production of evidence, that the testimony offered must *correspond with the material allegations, and be confined to the point in issue*. Hence, all evidence of collateral facts which are incapable of affording any reasonable presumption or inference as to the principal fact or matter in dispute is by this rule excluded, as tending to divert the minds of the jurors from the point in issue, to excite prejudice and to mislead them, and as doing injustice to the adverse party, who having had no notice of such evidence, cannot be prepared to rebut it. (1 Greenl. Ev. § 51 & seq.; 1 Stark. Ev. 430 & seq.) But where *knowledge* or *intent* is a material fact, extrinsic facts, which have a direct bearing thereon, are admitted, notwithstanding at first view they might appear to be collateral; for so far from being irrelevant, they may reasonably satisfy the mind as to the principal object of the inquiry. (1 Greenl. Ev. § 53; Hendrick's Case, 5 Leigh, 708; Martin's Case, 2 Leigh, 745; Spencer's Case, 2 Leigh, 751; Finn's Case, 5 Rand. 701; Wash's Case, 16 Grat. 540.)

Upon this rule it is that the admissibility of evidence of the *general character* of the parties depends. Where that character enters into and constitutes a part of the subject matter of the cause, as in actions for seduction and adultery, or of slander and libel, according to some authorities the evidence is admissible; otherwise it is for the most part inadmissible. (1 Greenl. Ev. § 54, 55.)

It is sufficient if the *material allegations* be proved, that is, the *substance of the issue*. But it should be observed that every allegation *descriptive*

of the identity of that which is essential to the merits of the case, is of the substance of the issue, and must be proved as stated. Thus in written instruments, every part operates by way of description of the whole; and, therefore, in respect to them allegations of names, sums, magnitudes, dates, duration, terms, and the like, being essential to the identity of the writing, must in general be precisely proved. (1 Greenl. Ev. § 56 & seq.)

4. The Doctrine touching the *Burden of Proof*.

The burden of proving any fact rests upon him who affirms it; and hence the party who asserts the affirmative of any issue is, at common law, entitled always to begin and to conclude the argument of the cause; although with us the principle is subject to this modification, that if the plaintiff has anything to prove, notwithstanding it be only damages, he is regarded as having substantially the affirmative of the issue, and is to begin and conclude. (1 Greenl. Ev. § 74 & seq.) More will be said of this subject under a subsequent head *Post*, p. .)

5. The best Evidence attainable is required to be Produced.

This rule does not demand the greatest amount of evidence which can possibly be given of any fact; but its design is to prevent the introduction of any which, *from the nature of the case, supposes that better evidence is in the possession of the party*. It is adopted for the prevention of fraud; for when it appears that the better evidence is withheld, it is fair to presume that the party had some sinister motive for not producing it, and that if offered, his design would be frustrated. A copy supposes an original, and therefore a copy is not admissible, in general, until some sufficient reason is shown why the original is not produced. A writing is the most satisfactory evidence of its own contents, and oral proof of its contents, therefore, is not allowable, unless it appears that the writing is lost or destroyed, or if in the hands of the adverse party, that due notice to produce it has been given. (Greenl. Ev. 882 & seq.)

All rules of evidence, however, are adopted for practical purposes in the administration of justice, and must be so applied as to promote the ends designed. Hence the rule under consideration is subject to *exceptions* where the *general convenience*, or the nature of the facts to be proved, requires it.

Thus the contents of a public record may be proved by a duly authenticated copy, because it would be inconvenient and unsafe to remove original records from their proper places of deposit, and because also they might be wanted in several places at the same time. So the *result* of the examination of *voluminous facts*, or of *many books and papers*, may be proved without producing the original materials. And so inscriptions on walls, mural monuments, grave-stones, surveyors' marks on boundary trees, and the like, may be proved by secondary evidence. (Greenl. Ev. § 91 & seq.)

The most conspicuous instances of the application of this rule are those which relate to the *substitution of oral for written evidence*. They may be arranged into three classes, including, (1), Those instruments which the law requires shall be in writing, as by the statute of *parol agreements* (V. C. 1873, c. 140; (2), Those contracts which the parties have put in writing; and (3), Those writings the existence of which is disputed, and which are material to the issue; and in none of the three can oral evidence be, *in general*, substituted for the writing. (Greenl. Ev. § 85 & seq.)

The exclusion of *hearsay* may be also referred to this head; but as that is to receive a separate consideration, it is not needful to enlarge upon it here.

6¹. Doctrine touching the *Admissibility of Hearsay*.

Hearsay evidence, as a general rule, is excluded from all judicial investigations, as wanting in that certainty and trustworthiness which such inquiries demand; and as supposing the existence of *better evidence*, namely, the testimony of the persons whose declarations constitute hearsay.

Let us attend to, (1), What hearsay is; (2), What is not hearsay; and (3), The exceptions to the rule excluding hearsay;

W. C.

1^m. What Hearsay is.

The term *hearsay* is used with reference to that which is written, as well as to that which is spoken, and in its legal sense it denotes that kind of evidence which does not derive its value solely from the credit to be given to the witness himself, but rests also in part on the veracity or competence of some other person. (1 Greenl. Ev. § 98, 99.)

2^m. What is *not Hearsay*, and therefore is *not Excluded*.

The instances which at first view seem to be *hearsay*, and yet are not, may be enumerated thus, (1), Information on which one has acted; (2), Expressions of bodily or mental feelings; and (3), Declarations accompanying an act done.

W. O.

1^a. Information on which *one has Acted*.

Where the question to be determined is whether a party acted prudently, wisely, or in good faith, the *information* on which he acted, whether true or false, is original and material evidence. This is often illustrated in actions for malicious prosecution; in cases of agency and of trusts; in cases of *letters and conversation* addressed to a person whose sanity is the fact in question; in cases of *replies* of servants, &c., at the house of a bankrupt, denying that he was at home. In all these and other like cases *the truth of what is said* is not the subject of inquiry, but the *fact that it was said*. (1 Greenl. Ev. § 101.)

2^a. Expressions of *Bodily and Mental Feelings*.

The usual expressions of bodily and mental feeling made at the time in question, are *original evidence*, and not *hearsay*. If they were the *natural* language of the affection, whether of body or mind, they furnish for the most part satisfactory evidence, and often the only proof of its existence. And whether they were real or feigned is for the jury to determine. (1 Greenl. Ev. § 102 & seq; Brogy's Case, 10 Grat. 722.)

3^a. Declarations *accompanying an Act Done*.

Such declarations are part of the transaction—the *res gestæ*, as it is styled—and as such are capable of being given in evidence. Of this character are the declarations, *contemporaneous with the act*, of co-conspirators, of agents and associates. (1 Greenl. Ev. § 108 & seq; Overton's Heirs v. Davisson, 1 Grat. 211; Williamson's Case, 4 Grat. 547; Hunter's Case, 7 Grat. 641.)

3^m. The Exceptions to the Rule Excluding Hearsay.

These exceptions will be found to embrace most of the points of inconvenience resulting from a stern and unbending application of the rule excluding hearsay; and to remove the principal objections which may be urged against it. They may be divided into five classes, namely, (1), Those relating to matters of public and general interest; (2), Those relating to ancient possessions; (3),

Declarations against interest ; (4), Testimony given on a former trial by a witness since deceased ; and (5), Dying declarations, which, however, are applicable only in cases of *homicide*, when made by the person injured, touching the cause of his death ;

W. C.

1^a. Declarations relating to *Matters of Public and general Interest.*

In matters of public interest to society, all persons in that community must fairly be presumed to be conversant, because they concern all ; and as common rights are naturally talked of amongst those interested, what is thus dropped in conversation by any one member of the community may be supposed to be true ; and declarations thus made, and also declarations made by persons who have had special reason and opportunity in any other way to know the facts, in the case of *ancient rights*, and where the *declarants are dead*, are admissible in evidence, provided such declarations appear to have been made *before any controversy arose* touching the matter to which they relate, or as the phrase is, *ante litem motam*. (1 Greenl. Ev. § 128, 130 & seq ; 1 Stark. Ev. 28 & seq ; Broadman v. Reed, 6 Pet. 328, 341 ; Ralston v. Miller, 3 Rand. 44 ; Harriman v. Brown, 8 Leigh, 707 & seq ; Mima Queen v. Hepburn, 7 Cr. 290 ; Gregory v. Baugh, 4 Rand. 611 ; S. C. 2 Leigh, 665 ; Overton v. Davisson, 1 Grat. 211 ; Smith v. Chapman, 10 Grat. 445 ; Clements v. Kyles, 13 Grat. 468 ; Cline v. Catron, 22 Grat. 378.)

2^a. Declarations relating to *Ancient Possessions.*

The declarations intended are *ancient documents purporting to be a part of the transactions* to which they relate, and not a mere narrative of them, such as conveyances and the like. If such documents are ascertained to be *genuine* by being *produced from the proper custody*, or otherwise accounting for them, and it appear that title has been claimed under them, and acts done corresponding to such claim, as by possession or the like, they are receivable as evidence that the transactions did actually occur. (1 Greenl. Ev. § 141 & seq.)

3^a. Declarations *against the interest of the Declarant.*

Declarations and entries made by persons *since deceased*, and *against the interest* of the person making them, at the time when they were made, are admissible in evidence, and constitute a third exception to the rule rejecting hearsay; an exception grounded on the extreme improbability of such declaration and entries being untrue. (1 Greenl. Ev. § 147 & seq.)

4^a. Testimony given on a Former Trial *by a Witness since Deceased*.

Where the testimony of the witness is given under oath, in a judicial proceeding, in which the adverse litigant was a party, and where he had the power to cross-examine him, and was legally called upon so to do, the great and ordinary tests of truth, the oath and the cross-examination being not wanting, the testimony so given is admitted *after the decease* of the witness in any subsequent suit between *the same parties*. So it is also received if the witness, though not dead, is out of the jurisdiction, or cannot be found after diligent search, or is insane, or sick and unable to testify, or has been summoned, but appears to have been kept away by the adverse party. (1 Greenl. Ev. 163 & seq.)

But this exception seems to have never been allowed in *criminal cases*. (Finn's Case, 5 Rand. 701; Brogy's Case, 10 Grat. 732.)

5^a. Dying Declarations.

As these are only applicable in cases of *homicide*, and when they are made by the *person injured*, touching the *cause of his death*, it will suffice here to say that they must be made whilst the person is actually *in extremis*, and *conscious* that he is so, under a sense of impending death, and without any expectation or hope of recovery. 1 Greenl. Ev. § 156 & seq; Roscoe's Crim. Ev. 23 & seq; Gibun's Case, 2 Va. Cas. 111; Hill's Case, 2 Grat. 608; Bull's Case, 14 Grat. 620.)

7. The Doctrine touching *Professional Confidence*.

In general, every individual in society is obliged to disclose in a court of justice, whatever he may know touching the cause under investigation, provided it does not tend to criminate himself; but there are some kinds of evidence which the law excludes or dispenses with, on *grounds of public policy*; because greater mischiefs would probably result from requiring or permitting its admission, than

from wholly rejecting it. Of this kind are professional communications made to *legal advisers*; and the rule is clear and well settled, that the confidential counsellor, attorney, or solicitor of the party, cannot be compelled, and without his client's consent whose privilege it is, will not be permitted to disclose communications made, or letters or documents delivered to, or writings or entries made by him in that capacity. The exemption extends to the interpreter through whom the communication is had with the client, and to the lawyer's clerk; but not to students in the office, nor to a physician, minister of religion, or any other party. (1 Greenl. Ev. § 236 & seq.) It embraces all communications, written or oral, made to an attorney or counsel, in his professional character, for the purpose of obtaining professional advice or aid. (1 Gr. Ev. § 240; *Parker v. Carter*, 4 Munf. 273; *Lyle v. Higginbotham*, 10 Leigh, 75; *Chahoon's case*, 21 Grat. 822.)

8¹. The Doctrine touching *Secrets of State*.

Secrets of state, and things the disclosure of which would be prejudicial to the public interest, are excluded, from public policy. These matters are either such as concern the administration of penal justice, or such as relate to the administration of government; but the principle of public safety is in both cases the same, and the rule of exclusion is applied no farther than the attainment of that object requires. Thus in criminal trials, the names of persons employed in the discovery of the crime are not permitted to be disclosed any farther than is essential to a fair trial of the prisoner's innocence or guilt. And the official transactions between the heads of the departments of the State and their official subordinates are in general to be regarded as privileged communications, but of course, as a general rule, not so as to screen either party from a judicial investigation of his conduct. And for the most part the chief executive of the government must determine how far the public interests will admit the production of papers, or the disclosure of information touching such official transactions. (1 Greenl. Ev. § 250 & seq; 1 Stark Ev. 71-'2; *Morris v. Creel*, 2 Va. Cas. 49.)

9¹. The Doctrine touching *Admissions*.

The rules of evidence touching *admissions* in civil transactions, and *confessions* in criminal matters, are essentially the same; but we are now con-

cerned with admissions only. Admissions being for the most part against the party's interest, are probably true, and for that reason are satisfactory evidence; but they are also evidence on grounds of public policy or convenience, as in the case of those implied from assumed character, acquiescence or conduct; and in the case of explicit and solemn admissions, such as releases, acknowledgments of record, and the like, they are evidence by virtue of the direct consent and waiver of the party. (1 Greenl. Ev. § 169, 170.)

Admissions are receivable in evidence when made by any *party to the record*, or one *identified in interest* with him, wherever the maker of the admission has *any interest* in the suit, whether others are joint parties on the same side with him or not, however the interest may appear, and whatever may be its relative amount. But where there are several parties on that side, the admission of one of them avails against those of them only who have a *joint interest* or a *privity in design* with him. (1 Greenl. Ev. § 171 & seq; Garland v. Agee, 7 Leigh, 362; Tabb v. Cabell, 17 Grat. 160; Taylor v. Peck, 21 Grat. 11.)

Admissions are also receivable although made by persons who are *not parties to the record*, provided they are, or were when the admission was made, *beneficially interested in the subject-matter* of the suit, whether by a legal or an equitable title. (1 Greenl. Ev. § 180; Walker v. Pierce, 21 Grat. 722.)

And in some cases admissions of *third persons, strangers to the suit*, are receivable. This may arise in various ways, as (1), Where the issue is *substantially* upon the mutual rights of such persons at a particular time, in which case the practice is to let in such evidence in general as would be legally admissible in an action between the parties themselves; (2), Where the admission is made by a stranger to whom the party has expressly referred another for information in regard to an uncertain or disputed matter; (3), Where the admission is made *by an agent* of the party, whilst the transaction is in progress, *dum ferver opus*; (4), Where the action is against the *surety*, upon a collateral undertaking, and the admission is made by the *principal* during the transaction of the business, so as to be part of the *res gestae*; or (5), Where there is a *privity*, that is a mutual or successive relationship to the same

rights of property between the maker of the admission and the party against whom it is sought to be adduced in evidence. And in all these cases of admissions by third persons, as they derive their legal force and effect from the relation of the party making them to the property or interest in question, and are taken as part of the *res gestæ*, they may be *proved by any competent witness* who heard them, without calling the party by whom they were made; the question being whether the admission was made, and not whether it was true, which is a *prima facie* inference of law. (1 Greenl. Ev. § 181 & seq.)

As to the *time and circumstances* of the admission, overtures of pacification, and propositions of compromise are excluded on grounds of public policy, in order not to discourage attempts at friendly adjustments of controversies. (1 Greenl. Ev. § 192; Baird v. Rice, 1 Call. 18; Williams v. Price, 5 Munf. 507.) And admissions extorted by duress or constraint are also excluded for obvious reasons. But it is no ground to exclude an admission that it was made under legal compulsion, as that of a witness, or of a respondent filing his answer to a bill in equity; and there is no difference in the admissibility of this sort of evidence, between *direct* and *incidental* admissions. (1 Greenl. Ev. § 192 & seq.) Admissions are not necessarily express; they may be *implied from assumed character, from language, and from conduct*. Thus where the existence of any domestic, social, or official relation is in issue, any recognition in fact of that relation is *prima facie* evidence of it against the party making the recognition. And so the suppression of documents is an admission that their contents were deemed unfavorable to the party suppressing them; the charging a particular person in a tradesman's book, or making out a bill of parcels in his name, is an admission that they were furnished on his credit; asking time for the payment of a note or bill is an admission of the holder's title; and the endorsement or acceptance of a note or bill is an admission of its genuineness, and of the facts recited in it. Even the *acquiescence* of a party in conduct or language *which is fully understood* by him, justifies any inference of admission which can properly be drawn from his passiveness and silence, supposing him not only to have opportunity to act or to speak, but that some action or reply would *properly and naturally*

be called for from men similarly situated. And so the possession of documents, or the fact of constant access to them, *sometimes* affects parties with an implied admission of their contents; but this sort of evidence is to be received with caution. (1 Greenl. Ev. § 195 & seq.)

As to the *effect of admissions*, the whole is to be taken together; that is, must be heard or read, and not a part without the rest, although the whole need not be believed. Nor are *verbal* admissions, standing alone, conclusive. They prove *prima facie* the truth of what they state, as against the party himself and persons claiming under him; but a mistake may be shown and correction made accordingly. *Judicial admissions*, however, that is, those made in court, as by the pleadings or for the purposes of the cause as an agreed substitute for the regular legal evidence of the fact at the trial, or by the payment of money into court, are conclusive as long as they stand. But if improvidently made, the court, in its discretion, may relieve the party by a special order adapted to the case. So, admissions which have been *acted upon by others* are conclusive as between the party making them and those who have thereby been exposed to loss; and that whether the admission were in itself true or false. In some other cases, also, connected with the administration of public justice and of government, the admission is held conclusive on grounds of public policy. Thus, upon a prosecution for bribing a voter, the accused party is not allowed to say that the person whom he sought to influence had no vote. Admissions in deeds are, as *between the parties* to them, generally conclusive; but other admissions *in writing*, such as receipts and the like, are no more conclusive than oral admissions. (1 Greenl. Ev. § 201 & seq; Purcell v. Purcell, 4 H. & M. 507; Spencer v. Pilcher, 8 Leigh, 566; Cox v. Thomas, 9 Grat. 312; Cecil v. Early, 10 Grat. 198.)

10¹. The Doctrine touching *Circumstantial Evidence*.

The grounds of belief of testimony are stated by Mr. Greenleaf as follows: (1), The instinctive principle of credulity implanted in man's nature; (2), The general experience of the truth of human testimony; and (3), The known and experienced connexion between collateral facts satisfactorily proved, and the fact in controversy. (1 Greenl. Ev. § 9, 10, 11.)

In every trial of fact the thing to be proved is either directly attested by witnesses who speak from their own actual and personal knowledge of its existence, or it is to be inferred from other facts satisfactorily proved. In the first case the proof rests upon the first and second grounds above stated; and in the latter on those two grounds, in addition to the third. The facts proved are in both cases directly attested. In the first the proof applies immediately to the *factum probandum*, without any intervening process, and it is, therefore, called *direct* or *positive* testimony. In the latter case, as the proof applies immediately to collateral facts, supposed to have a connexion, near or remote, with the fact in controversy, it is termed *circumstantial*; and sometimes, but not with entire accuracy, *presumptive*. Thus, if a witness testifies that he saw A. buy a suit of clothes of B. at a named price, to be afterwards paid, and saw B. deliver the suit to A.; this is a case of *direct evidence*; and giving to the witness the credit to which human testimony is generally *prima facie* entitled, the demand of B. against A. is satisfactorily proved. On the other hand, if a witness testifies that a suit of clothes which yesterday was B.'s property, and in his possession, is to-day in the possession of A.; here the facts themselves are directly attested; but the evidence they afford of the *factum probandum*, namely, A.'s liability to B. for their value, is termed *circumstantial*; and from these facts, if unexplained by A., the jury may, or may not, *deduce* or *infer*, or *presume* that A. owes B. for the clothes, according as they are satisfied or not of the natural and ordinary connexion between similar facts and the indebtedness of the person thus connected with them. In both cases the veracity of the witness is presumed in the absence of proof to the contrary; but in the latter case, there is an additional presumption or inference, founded on the known usual connexion between the facts proved and the conclusions aimed at, namely, the obligation of the party in possession of the suit to pay for it. (1 Greenl. Ev. § 13; 1 Stark. Ev. 558 & seq.)

It appears to be essential to circumstantial proof,

- (1), That the circumstances from which the conclusion is drawn should be fully established;
- (2), That all the facts proved should be consistent with the hypothesis;

(3), That the circumstances should be of a conclusive nature and tendency ;

(4), That the circumstances should, to a moral certainty, actually exclude every hypothesis but the one proposed to be proved ; and

(5), That mere circumstantial evidence ought in no case to be relied on where direct and positive evidence, which might have been given, is withheld by the adverse party. (1 Stark. Ev. 560 & seq, 571 & seq.)

11¹. Doctrine as to the *Number of Witnesses Required*.

By constitutional provision no one can be convicted of treason against the United States, unless on the testimony of two witnesses to the same overt act, or on confession in open court, (U. S. Const. Art. III, § iii, 1); and by statute in Virginia a similar provision is applied to treason against the commonwealth. (V. C. 1873, c. 186, § 1.) By the common law also, the proof of the crime of perjury must consist of two witnesses, of one witness and corroborating circumstances, or of documentary testimony; and in a court of chancery, by the law of that forum, an answer responsive to an averment on the other side can be disaffirmed only by two witnesses, or by one witness and corroborating circumstances, (1 Greenl. Ev. § 257 & seq, 260; Thornton v. Gordon, 2 Rob. 719); and lastly by statute, a writing must be proved, for the purpose of being registered by two witnesses. (V. C. 1873, c. 117, § 2.) But with these exceptions, it is believed that every fact capable of being established by oral evidence at all, may be proved by a single witness, supposing him to be credited. For although a will of either lands or chattels must be *attested* by two or more subscribing witnesses, either of these witnesses suffices to prove it, if he can testify to the due execution thereof by the testator, and the due attestation by the other attesting witness as well as by himself. (1 Lom. Ex'ors, 220-'21; Jesse v. Parker, 6 Grat. 64; Johnson v. Dunn, 6 Grat. 627.)

12¹. Doctrine as to the Introduction of *Parol Evidence to affect that which is Written*.

It must suffice here merely to say that in general, parol evidence cannot be introduced in order to alter, explain, or in any wise affect that which is written; and for the reasons, extent, and limitation of the principle, to refer to 1 Greenl. Ev. § 275 &

seq; 2 Insts. Com. & Stat. Law, 955 & seq, 964 & seq.

2^k. The Principles applicable to *Written Evidence*.

Writings are of two kinds, namely: (1), Public, and (2), Private; and whether public or private the practitioner has to observe respecting them, (1), The mode of obtaining a preliminary inspection thereof; (2), The mode of proving them; and (3), Their admissibility and effect;

W. C.

1^l. Public Writings.

Public writings consist of the acts of public functionaries in the *executive*, *legislative*, and *judicial* departments of government, whether domestic or foreign; including the transactions which official persons are required to enter in books or registers in the course of their public duties.

Public writings are either, (1), Judicial; or (2), Not judicial;

W. C.

1^m. Public Writings Judicial, including Records.

We are to note, as before stated, (1), The mode of obtaining a preliminary inspection of judicial writings, whether of record or not; (2), The mode of proving them; and (3), Their admissibility and effect;

W. C.

1ⁿ. Mode of Obtaining a *Preliminary Inspection of Public Judicial Writings*.

The records of the *public courts*, including writs and other papers filed in any cause, are open to the inspection of every one, upon paying the fees of the officer charged with their custody; and if denied, the right is enforced, where an action is pending, by *rule of court*, and where no action is pending, by writ of *mandamus*. (1 Greenl. Ev. § 472, 477, 478.)

2ⁿ. The Mode of *Proving Public Judicial Writings*.

The distinction here to be made is between, (1), Records; and (2), Judicial writings not of record.

W. C.

1^o. Mode of Proving *Judicial Writings of Record*.

Judicial writings of record are proved by, (1), The production of the original itself; (2), The production of an exemplified copy; (3), The production of an office-copy; or (4), The production of an examined copy;

W. O.

1^p. The Production of the *Original Record itself*.

The original record itself is produced only when the cause is *in the same court* whose record it is, or where it is the subject of proceedings in a superior court; in which latter case it is obtained by a writ of *certiorari*, issued with us by the superior court itself, but in England by a *certiorari* issued from the court of chancery, and a *mittimus* sending it thence into the superior court, where it is wanted. (1 Stark. Ev. 223-'4; 1 Greenl. Ev. § 502; Pitt v. Knight, 1 Saund 99; Burk v. Tregg, 2 Wash. 216, &c.; Anderson v. Dudley, 5 Call. 529; Ballard v. Thomas, 19 Grat. 18.) At common law the original record must have been produced wherever the cause was in the same court, a copy, however authenticated, being under no circumstances admissible, unless the original were lost. (Burk v. Tregg, 2 Wash. 216; Anderson v. Dudley, 5 Call. 529.) But it having been enacted by statute (V. O. 1873, c. 172, § 5,) that a copy of *any record* or paper in the clerk's office of any court, attested by the clerk, may be admitted as evidence *in lieu of the original*, the usage of proving the record, even in the same court, by a certified copy, has become so established that it was necessary to invoke the authority of the court of appeals to determine that the original was admissible at all. (Ballard v. Thomas, 19 Grat. 18.)

Except in the court to which the record belongs the original is not produced, as was remarked above, but the record must be proved *by a copy*, being an exception to the general rule, which requires the production of the best evidence, because to remove the record itself would endanger its loss, and because, moreover, being interesting to many persons it might be wanted as evidence in different places at the same time. (1 Greenl. Ev. § 482.)

2^p. The Production of an *Exemplified Copy*.

An *exemplified* copy of a record is, first, a copy certified under the *great seal of State*; and second, a copy certified under *the seal of the*

court of whose proceedings it is the record. (1 Stark. Ev. 224.)

The great seal of a sovereign State proves itself, not only in its own courts, but in all foreign courts as well; and thus a record authenticated under that seal is admitted in the courts of all civilized countries as being thereby well proved. The seal of the court proves itself and the authenticity of the record to which it is attached, within the limits of the country to which the court belongs; but in a foreign country, it must itself be proved, unless by statute or usage it is admitted without. (1 Greenl. Ev. § 503, 514; 1 Stark. Ev. 224.)

The States composing this Confederacy are foreign to one another in all particulars wherein they are not made one by the Federal constitution, and their records would be regarded accordingly; but foreseeing the inconveniences arising from this source, the United States Constitution provides that "Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof." (Art IV, § 1.) Accordingly, Congress has directed that "the records and judicial proceedings of the courts of any State or territory, (or of any country subject to the jurisdiction of the United States), shall be proved or admitted in any other court within the the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with the certificate of the judge, chief-justice, or presiding magistrate, that the said attestation is in due form. And the said records and judicial proceedings so authenticated shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken." (Rev. Stats. U. S. § 905.) But in order that they may have in other States such faith and credit, the parties must have *appeared*, or have been *personally summoned*. (Hampton v. McConnell, 3 Wheat. 234; Mayhew v. Thatcher, 6 Wheat. 129; Mills v. Duryee, 7 Cr. 484; D'Arcy v. Ketchum,

11 How. 175 ; *Christmas v. Russell*, 5 Wal. 302.)

This method of authentication is not exclusive of any other which the State where the record is offered in evidence may think fit to adopt; and the provision, it will be observed, relates only to the proceedings of *courts of record*, and therefore do not apply to the judgments of justices of the peace. (1 Greenl. Ev. § 505, 506.) In Virginia an act of assembly provides for the proof and effect of records and judicial proceedings of any court of the United States, or of any State in any court of this State, in terms identical with the United States statute above quoted. (V. C. 1873, c. 172, § 15.)

3^d. The Production of an *Office-copy*.

A judicial writing of record may be proved thirdly, by an *office-copy*, that is, a copy attested as a true copy, by a person who has official charge of the original. It seems to be the better opinion, at least in the United States, that independently of statute, an officer who has the legal custody of public records, whether of courts or of public offices, is *ex officio* competent to certify copies, which are receivable in evidence *within the country*. If the record be a foreign one, the office-copy must itself be authenticated, either under the great seal of State, which proves itself, or under the seal of the court, proved by a witness. (1 Greenl. Ev. § 507, 514.)

We have seen that in Virginia we have a statute expressly authorizing the admission of such an office-copy in lieu of the original. (V. C. 1873, c. 172, § 5.)

4^d. The Production of an *Examined Copy*.

A fourth mode of proving a record is by means of an *examined copy*, which means a copy which a witness, who is produced to the court, can prove he compared with the original and found to be a true copy. But, of course, it must appear that the original was genuine, as by its being found in the proper place of deposit, or in the hands of the legal custodian. (1 Greenl. Ev. § 508.)

This mode of proof is as well applicable to a

foreign as to a domestic record. (1 Greenl. Ev. § 514.)

Where a record is lost, and is *ancient*, its existence and contents may sometimes be *presumed*; but whether ancient or recent, after proof of the loss its contents may be proved, as in the case of any other document, by any secondary evidence which is the best the nature of the case admits of. (1 Greenl. Ev. § 509; Brander v. Chesterfield Justs. 5 Call. 548; Lyons v. Gregory, 3 H. & M. 237; Corbett v. Nutt, 18 Grat. 624.)

In Virginia, provision is made by statute for the renewal, in the most authentic form possible, of such books of record as may be lost, or have become illegible. See V. C. 1873, c. 172, § 11 & seq.

2°. Mode of Proving *Judicial Writings not of Record*.

Judicial writings not of record embrace many things which are generally parts of records, but which may exist, or at least require to be proved separately, as writs, verdicts, answers in chancery, depositions, testaments, letters of administration, judgments of inferior courts, and foreign judgments. The mode of proof of all these, however, being closely assimilated to the proof of records, the student is referred to the preceding discussion, and to 1 Greenl. Ev. § 510 & seq.

3°. Admissibility and Effect of *Public Judicial Writings*.

Here again, it is needful to make the same distinction as before between (1), Records; (2), Other judicial writings;

W. C.

1°. Admissibility and Effect of *Records*.

Let us take notice of (1), The admissibility and effect of records in respect to the parties thereto; (2), In respect to the privies thereto; (3), In respect to the distinction between the record as proof of the fact of a judgment or decree, or as proof of the facts upon which it was based; and (4), In respect to foreign judgments;

W. C.

1°. Admissibility and Effect of Records in Respect to *the Parties* thereto.

When a cause has been once fairly tried, the public peace demands that there should be no more litigation touching *that question* between *those parties*, and persons claiming in privity with them, forever. And by *parties* we understand all who were directly interested in the subject-matter, and had a right to assert their claims, to adduce testimony, and cross-examine the opposing witnesses, or to control the proceedings, and to appeal from the decision. But in order to prevent this rule from working injustice, it is essential that its operation be *mutual*. Both the litigants must be concluded or neither; and the rule applies to that only which was *directly in issue* in the former suit, and not to everything incidentally brought into the controversy during the trial. And so it is only where the point in issue has been *determined* that the judgment is a bar. If, by reason of discontinuance or non-suit, or otherwise, there has been no judgment upon the matter in question, the proceedings are not conclusive; and the decision, in order to be a bar, must be *upon the merits*. (1 Greenl. Ev. § 522 & seq; 7 Rob. Pr. 2 & seq; Bart. Pr. 199; Paynes v. Coles, 1 Munf. 373; Downes v. Morrison, 2 Grat. 250; Duncan v. Helms, 8 Grat. 68; Johnson v. Jennings, 10 Grat. 1; Smith v. Chapman, 10 Grat. 445; Baylor v. Dejarnette, 13 Grat. 152; Stinchcombe v. Marsh, 15 Grat. 202; Anderson v. Miller, 15 Grat. 279; Parson v. Harper, 16 Grat. 64; Honaker v. Howe, 19 Grat. 511; Sands' Case, 20 Grat. 800; Linke v. Fleming, 25 Grat. 704; Johnson v. Gill, 27 Grat. 587; Supervisors v. Dunn, 27 Grat. 608.)

2^p. Admissibility and Effect of Records in respect to the *Privies thereto*.

The person who represents another, and the person represented, have a legal identity, so that whatever binds the one, in relation to the subject of their common interest, binds the other also. Whenever, therefore, a record is admissible and conclusive as to the parties, it is in like manner admissible and conclusive as to their *privies*. (1 Greenl. Ev. § 536, &c.; 7 Rob. Pr. 137 & seq; Cases *supra*.)

3^p. Admissibility and Effect of a Record in respect to the Distinction between its being proof

of the Existence of a Judgment or Decree, and Proof of the *Facts upon which the Judgment, &c., was Based.*

A judgment, when used by way of *inducement*, or to establish a *collateral* fact, may be admitted, though the parties are *not the same*; as to prove the legal infamy of a witness; to let in proof of what was sworn at the trial; to justify proceedings in execution of the judgment; to prove the *amount* which a principal has been compelled to pay for the default of his agent, or a surety for the default of his principal; and in general, to show *the fact that such a judgment was rendered.* (1 Greenl. Ev. § 527, 538; Lovell v. Arnold, 2 Munf. 172, 174.) But whilst a judgment is admissible to prove *the fact* that a judgment has been obtained against a sheriff for the default of his deputy, and also to show the *amount* recovered; for as to those particulars the judgment, being a public transaction, cannot be considered as *res inter alios acta*, yet it is not admissible to prove, in a subsequent action by the sheriff against the deputy, the facts on which the judgment was based, namely, the defaults of the deputy, unless he was notified to defend the suit. (1 Greenl. Ev. § 538, 539; Lovell v. Arnold, 2 Munf. 172, 174; 7 Rob. Pr. 150 & seq; Cases *Supra*, 1^p.)

4^p. Admissibility and Effect of Foreign Judgments.

The principle that a cause of action once finally determined *on the merits* by a *competent* tribunal, cannot afterwards be litigated by new proceedings between the *same parties*, either before the same or any other tribunal, seems in nature and reason to be scarcely less applicable to a *foreign* than to a *domestic* judgment; and in England, it is so established. (7 Rob. Pr. 7, 8.) But the general doctrine in the United States, in relation to foreign judgments *in personam*, that is, against the person, in contradistinction to such as relate to and affect *specific property*, is understood to be that they are *prima facie* evidence, but impeachable. (1 Greenl. Ev. § 547.)

We have seen that as well the law of the United States Constitution and statutes, as of

our own statutes in Virginia, give to records and judicial proceedings of any court of the United States, and of any of the States or territories, the same faith and credit as they have in the courts of the State, territory, or district whence the records came. (*Ante*, p. 716; U. S. Const. Art. IV, § i; Rev. Stats. U. S. § 905; V. C. 1873, c. 172, § 13.)

Foreign, as well as domestic judgments *in rem*, that is, judgments which relate to some definite *subject-matter*, and attach to it a permanent character, stand upon a different footing from judgments *in personam* only, and for the general peace and tranquillity are commonly conclusive upon everybody as to the title of the subject, and the character impressed by the sentence, and in many cases have been held conclusive also as to the facts included in them. Of this description are most of the proceedings in the courts of admiralty, such as questions of prize in captures at sea, of salvage, of forfeiture, &c. Of this description also, are sentences of probate and administration, of marriage and divorce, and of attachments against property, where the proceeding is *in rem*. (1 Greenl. Ev. § 540, 541 & seq; 7 Rob. Pr. 306, § 324, 345, 350, 352, &c.)

2°. The Admissibility and Effect of *Judicial Writings, other than Records.*

The admissibility and effect of judicial writings other than records, being governed substantially by the same considerations and rules as those which regulate records, the subject may be passed by with a reference to 1 Greenl. Ev. § 550 & seq.

2^m. Public Writings *not Judicial.*

Public writings not judicial, consist, amongst many other public documents, of acts of State, legislative acts and journals, official registers, foreign laws, laws of other States, &c. We are to observe here, as under the head of judicial writings, (1), The mode of obtaining a preliminary inspection of public writings not judicial; (2), The mode of proving them; and (3), Their admissibility and effect;

W. C.

1^a. The Mode of Obtaining a Preliminary *Inspection of Public Writings not Judicial.*

The methods of obtaining such preliminary inspection when one has a right to it are essentially the same as in the case of records, (*Ante*, p. 714.) But it must be observed that there is not the same universal right to an inspection of this class of writings, although they are said to be *public*, as of records. Thus, the books of corporations are open to the inspection of corporators, but not of strangers; and those of public officers can be examined only by those who have an interest in the subject to which they relate; and in all cases of public writings not judicial, if the disclosure of their contents, in the opinion of the court, or of the chief executive magistrate, or of the head of department in whose custody the writings are, will be injurious to the public interests, an inspection will be denied. (1 Greenl. Ev. 474 & seq.)

2ⁿ. The Mode of *Proof of Public Writings not Judicial*.

Of some matters the courts take *ex-officio*, judicial notice, without proof, namely, amongst others, of—

The political constitution of their own country, its essential political agents or officers, and its essential ordinary and regular operations;

And without other proof than inspection, of—

The great seal of State, and the seals of the judicial tribunals of their own country;

The seals of foreign nations, recognized by their own sovereign;

The seals of foreign courts of admiralty, and of *notaries public*; and

Public Statutes.

And in Virginia, by statute, it is provided that all courts and officers shall take notice of the signature of any of the judges, or of the governor of the State, to any judicial or official document. (V. C. 1873, c. 172, § 3.)

But *public writings*, not judicial, must in general be in some way authenticated before they can be used in evidence. The general regulations upon the subject which call for special mention are as follows:

Acts of State, such as proclamations and other acts and orders of the executive, of like character, may be proved by a printed copy of the document, purporting to be issued from a press authorized by government. (1 Greenl. Ev. § 479);

Legislative acts and resolutions, including private statutes, are at common law proved only by an *exemplified* or an *examined* copy. (1 Greenl. Ev. § 480). But in Virginia acts and resolutions of the general assembly, published by the public printer for the time being, (that is, purporting to be so published), shall be received as evidence in the courts of this State for any purpose for which the original acts or resolutions could be received, and with as much effect. (V. C. 1873, c. 15, § 8). This provision applies not only to the acts and resolutions of each session, as they are separately printed, but to the thirteen volumes of Hening's statutes at large, to the several revisals of 1792, 1802, 1807, 1819, and 1849; but as is presumed to the new editions of the latter, of 1860 and 1873, respectively. (V. C. 1873, c. 15, § 8; Acts 1849-'50, p. 12, c. 9; Acts 1859-'60, p. 191, c. 85; Acts 1872-'3, p. 205, c. 228; Id. p. 371, c. 382). And similar provisions existing in most of the other States, and also in respect to United States statutes, (Rev. Stat. U. S. § 908,) a kind of common law has sprung up, whereby printed copies, purporting to be printed by authority, of acts of Congress and of statutes of the sister States, are permitted to be introduced as evidence. (Taylor v. Bank of Alexandria, 5 Leigh, 471; Thompson v. Muller, 1 Dal. (Pa.) 462; Biddis v. James, 6 Bin. (Pa.) 321; Cox v. Robinson, 2 Stew. & Port. (Ala.) 91; Raynham v. Canton, 3 Pick. (Mass.) 293.) It is safer, however, to have the statutes of the sister States authenticated, according to the act of Congress, passed pursuant to Art. IV. § i, of the United States constitution, under the *great seal of the State* (Rev. Stat. U. States, § 905), which proves itself *no matter by whom affixed*. (Warner's Case, 2 Va. Cas. 95; Hunter v. Fulcher, 5 Rand. 126; United States v. Amedy, 11 Wheat. 392; Craig v. Brown, 1 Pet. 352; Leland v. Wilkinson, 6 Pet. 317.)

The *journals of the legislature* cannot, any more than records of courts, be safely removed from their proper place of deposit, and like records, might be wanted at different places at the same time. They are, therefore, not proved by the production of the originals, but by copies *exemplified* or *examined*, and in the United States, by a copy purporting to be printed by the public printer,

by authority. (1 Greenl. Ev. § 482.) In Virginia special provision is made, (after the manner of 8 & 9 Vict. c. 113), that "copies of the journal of either house of the assembly, printed as prescribed in chapter nineteen, (that is, under the direction of the superintendent of public printing,) shall be received as evidence for any purpose for which the original journal could be received." (V. C. 1873, c. 172, § 2.)

Official registers, or books kept by persons in public office, in which they are required to write down particular transactions occurring in the course of their public duties, and under their personal observation, are generally admissible in evidence, in consequence of the publicity of their subject-matter, because they are made by authorized and accredited agents, and because of the inconvenience which would be occasioned by rejecting them. They may be proved by the books themselves, or by *exemplified* and *examined* copies; and in Virginia, where the document is a record or paper in the clerk's office of any court, or in the office of the secretary of the commonwealth, treasurer, register, or either auditor, or of the board of public works, or of education, it may be proved by a copy attested by the officer, or by the secretary or clerk of the board in whose office the record or paper is. (V. C. 1873, c. 172, § 5.)

By the United States statutes it is provided that copies of any books, records, papers, or documents in any of the executive departments, or their subordinate sub-divisions, authenticated under the seals of the departments respectively, shall be admitted in evidence, equally with the originals. (Rev. Stats. U. S. § 882 & seq.)

Foreign laws must be proved as facts, not to the jury, but to the court. If they are not in writing, that is, not statutory, they are to be proved by *experts* who are skilled in them, and who are examined as other witnesses. If they are statutory, the common law requires that they should be proved by an *exemplified* or an *examined* copy. (1 Greenl. Ev. § 486 & seq.)

As between *these States*, we have seen the mode of proving them. (*Supra*, 723; *Ante*, 716.)

It may be added, in conclusion of this head,

that it is provided by statute in Virginia, that a duly attested copy of any writing filed in a suit may be filed in another suit on the same writing, and the defendant shall plead thereto as if the original were filed. (V. C. 1873, c. 172, § 6.) And the court may, *for good cause*, order an original paper filed in a cause to be delivered to an applicant, retaining in its stead a copy thereof, and may make any order to prevent the improper use of the original. (V. C. 1873, c. 172, § 7.)

3^a. Admissibility and Effect of *Public Writings not Judicial*.

In order to render documents of this character *admissible*, their contents must be *pertinent to the issue*, and the document itself must originate with the person or persons *whose duty it was to make it*; and the matter it contains must be such as belonged to *his or their province*, or came *within his or their official cognizance and observation*. When a document possesses these requisites, its effect is to prove either *prima facie* or conclusively the facts it recites. (1 Greenl. Ev. § 491 & seq.)

2^l. Private Writings.

In discussing the employment of private writings as instruments of evidence, we must note (1), The doctrine touching their production at the trial; (2), The mode of proving them; and (3), Their admissibility and effect;

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1^m. The Doctrine touching the Production of Private Writings at the Trial.

Supposing the writing to be in the possession of the party who desires to use it, he has nothing to do but to produce it, nor is he allowed to prove its contents otherwise than by producing it. If it be lost or destroyed, that may be shown by the affidavit of any one who knows the fact, even the affidavit of the party himself, whence it should appear, either directly that it is destroyed, or if the allegation be of its loss, that diligent and *bona fide* search has been made for it unsuccessfully, in the place or places where it was most likely to be found; and if the court be satisfied that it is lost or destroyed, secondary evidence of its contents may be admitted, if the instrument itself would be available were it present. But if it be an instrument which, if found, the defendant may be compelled

again to pay to a *bona fide* holder, the plaintiff cannot recover in a court of law unless he furnishes satisfactory proof that *it is destroyed*. (1 Greenl. Ev. § 558.)

If the writing be in the hands of a third person, who has a right to keep it, its production may be constrained, in favor of a party who has an interest in it, and consequently a title to use it in evidence, by means of a *subpoena duces tecum*, which the court will in a proper case order to be issued, as we have seen, (V. C. 1873, c. 172, § 27 & seq); and when it is in the possession of an adverse party its production may be compelled by a suit in equity, or in Virginia by an application to the equitable power of the law court, in pursuance of a statute provided for the purpose, (V. C. 1873, c. 172, § 44 & seq); or the party wishing to use it may, after giving notice to the adversary to produce it, *prove its contents*. (1 Greenl. Ev. § 560.) And the contents may be proved without notice to produce, where the writing to be produced, and that to be proved, are *duplicate originals*, or where it is itself a notice, such as a *notice to quit*; or where, from the nature of the action, the defendant has notice that the plaintiff imputes to him the possession of the instrument, as in trover for any writing; or lastly, where the adversary has obtained possession of it from a witness in fraud of a *subpoena duces tecum*. (1 Greenl. Ev. § 561 & seq.)

If, upon being produced, the writing (whether it be a *deed* or not) appears to have been *altered*, it is incumbent on the party offering it in evidence to *explain* its appearance, either by the alteration having been noted in the attestation clause, as made before signing, or by other positive evidence to the same effect, or presumptively, in consequence of the hand-writing and ink being the same with the body of the instrument. But a material distinction is to be observed between the effect of an *alteration*, as it is called, made *by the party*, and a *spoliation*, made *by a stranger*, or by casualty. And a further distinction must also be noted between the *alteration* of a writing evidencing an *executed contract*, such as a *conveyance*, and a writing evidencing an *executory contract*, to be performed in *futuro*.

Alteration of an *executory contract* vitiates it wholly, unless it be both *immaterial* and *innocent*.

Alteration of an *executed contract* has no effect on the *validity* thereof; but as the conveyance can only have effect as it was originally made, if the party producing it cannot show what the *original contents* were, it cannot avail him.

On the other hand, *spoliation* of neither class of writings will ever vitiate either; but for the reason just stated, it may so impair the proof as to make the instrument unavailing. (1 Greenl. Ev. § 564 & seq.)

2^m. Mode of *Proving Private Writings*.

Where there are *subscribing witnesses* to a writing, the law is peremptory in requiring them, or at least one of them, to be produced, as the *best evidence* of the genuineness of the instrument. But to this rule there are sundry exceptions, namely: (1), Where the instrument is *thirty* years old or more, comes from the proper custody, and is otherwise free from suspicion; in which case it is not needful to call the subscribing witnesses, though they be living. (2), Where the writing is produced pursuant to notice, by the *adverse* party, who *claims an interest under it*. (3), Where the writing is an *official bond*, like that of a sheriff, or of an executor, guardian, &c., executed under the direction of a court or some public functionary, and preserved in some public registry, in which case, as has been seen, an office-copy is admitted without further proof of the original. (4), Where, in Virginia, a bill, declaration, or other pleading alleges that any person *made, endorsed, assigned, or accepted any writing*, in which case *no proof* of the hand-writing of such person shall be required unless the fact be denied by an affidavit, with the answer, plea, or other pleading which puts it in issue. (V. O. 1873, c. 167, § 39; *Shepherd v. Fry*, 3 Grat. 442; *Phaup v. Stratton*, 9 Grat. 618; *Jas. R. & K. Co. v. Littlejohn*, 18 Grat. 767); and (5), Where the party, either from *physical or legal obstacles*, is disabled to *adduce the subscribing witnesses*; either because they are dead, or insane, or are out of the jurisdiction, or cannot be found, &c. (1 Greenl. Ev. § 569 & seq.)

In this last case, when it is impracticable to produce the subscribing witnesses, or either of them, *secondary* evidence of the execution of the instrument being rendered admissible, the next most trust-worthy evidence of the fact is deemed to be

proof of the *hand-writing* of one or more of the subscribing witnesses; and it is only when that becomes impossible that the law is satisfied with evidence of the hand-writing of the party himself; and if that cannot be proved, or the instrument cannot be otherwise shown to be genuine, it may not be read. (1 Greenl. Ev. § 574 & seq; Gilliam v. Perkinson, 4 Rand. 325; Raines v. Phillips, 1 Leigh, 483.)

The genuineness of hand writing may be proved by any witness who has had suitable means of acquiring a knowledge of it; that is, either by having seen the party write, or by being familiar with writings which he himself has treated as genuine. (1 Gr. Ev. § 577; Redford v. Peggy, 6 Rand. 316; Sharp v. Sharp, 2 Leigh, 249; Chahoon's Case, 20 Grat. 733; Sands' Case, 20 Grat. 800). In Virginia, it is not allowable to lay before the jury other proved specimens of the party's hand-writing, that it may judge by comparison thereof with the writing in question whether this latter be genuine; (Rowt v. Kyle, 1 Leigh, 216.) But in general, in England and in the United States, such comparison is allowed with other writings, admitted to be genuine, which *are already in the case*. (1 Greenl. Ev. § 578.)

3^m. The Admissibility and Effect of Private Writings.

The admissibility and effect of private writings, when offered in evidence, has already been, to some extent, incidentally considered, and cannot here be further discussed.

6^l. Bills of Exception.

The record of a trial by jury does not of itself contain the incidents which invest such occasions frequently with a powerful dramatic interest. It takes no notice of the rulings of the court in admitting or excluding evidence, nor of instructions as to the law, given by the court to the jury, much less of the testimony itself, or of the arguments of counsel. It confines itself, in short, to a very brief and dry abstract, setting forth nothing but the pleadings, the issue, the impannelling of the jury, the verdict and the judgment. If the court is supposed to err in any part of its conduct during the trial, in admitting or excluding evidence, in the instructions it gives to the jury as to the law, or otherwise, the record is made to embrace so much of the proceedings as will enable an appellate

court to understand, and if need be correct, the ruling and judgment of the court below, by means of what is called a *bill of exceptions*, which is nothing more than a clear and explicit statement, attested by the signature of the judge of the action of the court, and of the circumstances which attended it. The whole object of a bill of exceptions being to exhibit upon the record the supposed mistakes of the court which tries the cause, with a view to have it corrected, if the case is one not capable of being reviewed in a higher court, a bill of exceptions is of course superfluous and out of place.

At common law, no such device as a bill of exceptions existed, so that, if one were aggrieved in the particulars indicated, he was without remedy. It was first allowed by statute Westm. II, 13 Edw. I, c. 31, which has been in substance enacted in Virginia, our statute providing that, "In the trial of any case at law, in which an *appeal*, *writ of error*, or *supersedeas* lies to a higher court, a party may except to any opinion of the court, and tender a bill of exceptions, which (if the truth of the case be fairly stated therein), the judge or justices, or the greater part of those present, shall sign; and it shall be a *part of the record of the case*." (V. C. 1873, c. 173, § 8.)

The doctrines practically applicable to bills of exceptions will be stated more in detail in a subsequent connexion, (*post*, p. .)

7¹. Considerations which ought to regulate the *Application of the Evidence to the Cause*.

The jurors, as will readily be supposed, are not left to make up their verdict according to their mere whim or caprice. They are and ought to be controlled in their application of the evidence to the issue which they are sworn to try, by several considerations, of which, from the nature of the tribunal itself, and still more from the vagueness of the issues generally submitted to them, they are too apt to lose sight; and of which it is the business of counsel persistently to remind them. Thus, (1), The jury is confined in its inquiries to the issue; (2), The verdict ought to be given to the party most successful in his proofs; and (3), The burden of proof is generally upon him who has to maintain the affirmative of the issue;

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1^k. The Jury is to be *Confined in its Inquiries to the Issue*.

The jury is to take no matter into consideration but the question *in issue*; for it is to try the issue, and that only, that jurors are summoned. Thus, upon an issue that a release was obtained *by duress*, the jury cannot inquire into the fact of the execution of the release, for that is *not in issue*. So where defendant in an action of *assumpsit*, pleads that the cause of action did not accrue within five years, on which issue is joined, it is not competent to the plaintiff to prove that the action was grounded upon a fraudulent receipt of money by defendant, and that the fraud was *not discovered* until within five years of the action, for the issue was merely upon the accrual of the right of action within five years. (St. Pl. 83-'4; Id. (Tyler's Ed.) 117; 1 Greenl. Ev. § 51 & seq.)

In Virginia, we have what may perhaps be regarded as a slight modification of this principle, in the statute which enacts that in actions of trespass, general averments that defendant committed *other wrongs (alia enormia)*, and that the acts charged were done with *force and arms and against the peace*, may be omitted; and the plaintiff may still prove all that he could have done if such averments had been inserted in the declaration. (V. C. 1873, c. 167, § 12.)

2*. The Verdict is to be given to the Party *most Successful in his Proof*.

Thus, where in an action on a sealed instrument, the issue is upon a plea that it was obtained *by duress*, the verdict must be given for the defendant, if the jury shall think that the *preponderance* of evidence is in favor of the duress, otherwise for the plaintiff. (St. Pl. 84; Id. (Tyler's Ed.) 118.)

In criminal prosecutions the rule is, that the commonwealth must furnish such conclusive evidence of guilt as to remove any *rational doubt* of it; but in civil cases to prescribe such a rule would be a denial of justice to the party whose proof preponderates, although it be not conclusive.

3*. The Burden of Proof is generally upon him who has the *Affirmative of the Issue* to Maintain.

The burden of proof generally is upon that party who, in pleading, maintains the *affirmative* of the issue; for a *negative* is in general incapable of proof. Consequently, unless he succeed in proving that affirmative, the jury are to consider the opposite proposition or negative of the issue as established. Thus,

in the same example as under a preceding head, (1¹) it would be for the defendant to prove the duress; for it is he who affirms it; and if he fails, or offers no proof, the jury must find for the plaintiff. (St. Pl. 84; Id. (Tyler's Ed.) 118.)

To this general principle there are exceptions, even at common law; thus, upon an issue whether a party *is living or not*, the person asserting the *negative*, viz: that he is *not living*, must prove the death. (Wilson v. Hodges, 2 East. 312; St. Pl. 84, n (e); Id. (Tyler's Ed.) 118, n.)

Two other exceptions arise out of Virginia statutes. One is, that where a declaration or other pleading alleges that any person *made, endorsed, assigned, or accepted any writing*, no proof of the *hand-writing* of such person shall be required, (as it always was at common law,) unless the fact be denied by an affidavit with the plea or other pleading which puts it in issue. (Shepherd & als v. Frys, 3 Grat. 442; Kelly v. Paul, 3 Grat. 191; Phaup v. Stratton, 9 Grat. 617; Archer v. Ward, 9 Grat. 662; V. C. 1873, c. 167, § 39.)

The other is, where the plaintiffs or defendants sue or are sued *as partners*, and their names are set forth in the declaration; or where the plaintiffs or defendants sue or are sued *as a corporation*, it shall not be necessary to prove the fact of the *partnership* or *incorporation*, (as it was at common law,) unless with the pleading which puts the matter in issue there be an affidavit denying such partnership or incorporation. (V. C. 1873, c. 167, § 40; Phaup v. Stratton, 9 Grat. 615.)

Under this head comes to be considered the doctrine of *variance*. The proof offered may, in some cases, *wholly fail* to support the affirmative of the issue; but in others it may fail by a disagreement in some particular point or points only, between the allegation and the evidence. Such disagreement is called a *variance*, and is as fatal to the party on whom the proof lies as a total failure of evidence; at least, without an amendment of the pleadings, the jury being bound upon a *variance* to find the issue against him, unless the pleadings are amended. (St. Pl. 85; Id. (Tyler's Ed.) 118; 1 Greenl. Evid. § 63, &c., § 73.)

For example, the plaintiff declared *in covenant* for not repairing pursuant to the stipulations of the lease, and stated the stipulation to be "to repair when and

as *need should require*," and issue was joined on a traverse of the deed alleged. The plaintiff, at the trial, produced the deed in proof, and it appeared that the covenant was to repair "when and as need should require, and at *farthest after notice*;" the latter words having been omitted in the declaration. This was held to be a *variance*, because the additional words were material, and qualified the legal effect of the contract. (St. Pl. 85-'6; Id. (Tyler's Ed.) 118-19.)

Some observations by the American editor of Stephen's Pleading (St. Pl. 2nd App'x, n 6, p. cxxiv), and some by Mr. Stephen himself. (St. Pl. 1st App'x, n (57), p. lxxiv; Id. (Tyler's Ed.) App'x, n 57, p. liii), will illustrate the doctrine of variances, especially with respect to a point peculiarly liable to misapprehension, namely, the methods (by *several counts* and *several pleas*), of avoiding the consequences of a variance.

It may be well, in further exposition of the subject, to state some examples, derived from our own books, of variances which have, and also which have not been deemed fatal.

Material Variances.

A bond was described as dated *4th January, 1773*, and when produced at the trial, it bore date *4th January, 1775*. The variance was deemed *material*, and, therefore, fatal; that is, necessarily to require amendment of the declaration. (Gordon v. Browne, 3 H. & M. 219.)

A declaration in *assumpsit* on a written agreement takes no notice of a note subjoined to the agreement *limiting its continuance* to a given time. The variance was held material and fatal. (Newell v. Mayberry, 3 Leigh 250.)

Plaintiff sets forth in his declaration, that he holds under a lease for *five months*, for \$20, *payable in repairs and labor*. At the trial he proved a lease for *twelve months*, for a *money rent* of \$65. The variance was held to be fatal. (Olinger v. McChesney, 7 Leigh, 660; See also McAlexander v. Montgomery, 4 Leigh, 61; Colgin v. Henley, 6 Leigh, 86; Dickinson v. Smith & als, 5 Grat. 135.)

Immaterial Variances.

The obligor is described in the bond as "of the county of Essex," which description is omitted in the declaration. Variance held to be *immaterial*. (Evans v. Smith, 1 Wash. 72.)

A bond payable to "*Walter Peter, on account of*"

Messrs. Glen & Peter, merchants, Glasgow," is described in the declaration as payable to Walter Peter merely. The variance held to be *immaterial*. Peter v. Cocke, 1 Wash. 257.)

So the omission of *junior*, which is a mere *descriptio personæ*, and no part of the name, is not a variance. (O'Bannon v. Saunders. 24 Grat. 146.)

Plaintiff stated the agreement to be that he "would rent a house at Leeds, and furnish it, and board defendant a certain time for a certain price." He proved at the trial an agreement "to board defendant" for the time, and at the price stated, but nothing about renting and furnishing a house at Leeds. The variance was held to be *immaterial*. (Wroe v. Washington, 1 Wash. 357.)

In an action against a sheriff for permitting the escape from jail of a slave, the declaration calls the slave *Bill*. At the trial it appears that his name is *William Lee*. The variance was deemed *immaterial*. (Burnley v. Griffith, 8 Leigh, 442. See also Kevan v. Branch, 1 Grat. 274; Friend v. Woods, 9 Grat. 37; Richardson's Adm'r v. Pr. Geo. Justices, 11 Grat. 190; Henderson v. Stringer, 6 Grat. 130.)

As to the modes in which a variance may be taken advantage of, the discrimination to be made is between actions on *sealed instruments*, and *all other actions*, whether of contract or tort.

(1), In actions *on sealed instruments*.

Supposing the variance to consist in a *misdescription* of the instrument, the plaintiff may avail himself of the effect of a variance, *first*, By craving *oyer* of the writing, and *demurring*, (Sterrett v. Teaford, 4 Grat. 84; Duval's Adm'r v. Malone & als, 4 Grat. 24); *secondly*, By moving the court at the trial to reject the instrument when offered in evidence; and *thirdly*, By moving the court to instruct the jury to disregard it when received.

(2), In actions *other than on sealed instruments*.

The effect of the variance in all other actions than those on sealed instruments, whether of *contract or tort*, may be had by moving the court to *reject the evidence* when offered; and *secondly*, By moving the court to instruct the jury to *disregard the evidence* after it has been received.

The effect properly of a variance, when it is material, is to defeat the action, or defence, in respect to which it occurs; but a very extensive liberty of *amendment* is allowed, as well by the common law

as by statute. The common law permits amendments to be made even *after the jury are sworn*, in the discretion of the court; but the other party has then always the privilege of continuing the cause until another term of the court, a juror being withdrawn if a jury has been sworn. (*Syme v. Judge's Ex'ors*, 3 Call. 522; *Tabb v. Gregory*, 4 Call. 225.)

Our statutes go a little further, and empower the court, if it consider the variance not material to the merits of the case, and that the opposite party cannot have been prejudiced thereby to allow the pleadings to be amended on such terms as to the payment of costs, or postponement of the trial, or both, as *it may deem reasonable*. Or, instead of the amendment, the court may direct the jury to find the facts; and then, if it consider the variance such as could not have prejudiced the opposite party, it shall give judgment according to the right of the cause. (V. C. 1873, c. 173, § 7. See *Beasley v. Robinson & als*, 24 Grat. 325; *N. York Life Ins. Co. v. Hendren*, Id. 536.)

3^d. The Argument before the Jury.

The order of the argument, (which follows as soon as all the evidence is submitted to the jury), is that the counsel for the party who has the *affirmative of the issue*,—who, according to our practice, is always the plaintiff, if he have anything whatever *to prove*, although it be *only damages*, (*Ante*, p. 650; *Steptoe v. Harvey*, 7 Leigh, 501; *Overton v. Davisson*, 1 Grat. 211; *Young v. Highland*, 9 Grat. 16),—shall *open and conclude* the cause, the opposite counsel, one or more, answering his first speech, and being answered by his concluding argument.

If any instructions from the court are to be asked for, they *ought* to be submitted before the argument is commenced, so that the law of the case may be in the minds of the jury during the discussion, and also because it may save time. But in point of fact they are usually postponed until the jury is about to retire. And when in a *civil cause* the opinion of the court is expressed upon any legal point arising in it, that opinion is *not to be controverted* by counsel, but a bill of exceptions should be taken. (*Delaplane v. Crenshaw*, 15 Grat. 457.) But in the discretion of the judge, he may postpone an instruction until after the argument, or may allow it then to be asked for. (*Balt. & O. R. R. Co. v. Polly*, 14 Grat. 447.)

In order to expedite trials, it is provided by statute,

that not more than two counsel shall argue in a civil case on the same side, unless *by leave of the court*, (V. C. 1873, c. 173, § 9), a consent which is sometimes accorded when a number of distinct or of conflicting interests are represented on the same side.

A party cannot suffer a non-suit unless he do so before the jury retire from the bar. (V. C. 1873, c. 173, § 10.)

Papers read in evidence, though not under seal, may be carried from the bar by the jury. (V. C. 1873, c. 173, § 11; *Hansbrough & ux. v. Stinnett*, 25 Grat. 505.)

4th. Adjournment and Discharge of Jury.

In a civil case, or in a prosecution for a misdemeanor, the jury, after being impannelled, and in the progress of the evidence and the argument, and whilst considering their verdict, may be adjourned, in the discretion of the court, from time to time during the term, (*i. e.* during the temporary recesses of the court), but always with a charge to permit no conversation upon the subject of the cause before them, to take place in their presence. In trials for *felony*, they are required to be closely confined, under the constant charge and oversight of the sheriff, until their verdict is rendered. (Crim. Synops. 263.)

In case of necessity—even on a criminal charge,—as where a juror is taken sick, one of the jurors may be withdrawn after he is sworn, and another substituted; but if any evidence has been submitted, the whole must be gone over anew, for the benefit of the substituted juror. (*King v. Edwards*, 4 Taunt. 309; *Fall's Case*, 9 Leigh, 613; *Williams' Case*, 2 Grat. 567; *Silsby v. Foote*, 14 How. 218.)

In a *civil case*, where the jury prove unable to agree, a juror, by consent of parties, may be withdrawn, and for such inability, or other sufficient cause, it seems that, without consent of parties, it is competent to the court *to direct* the withdrawal of a juror, and the rest of the jury being, of course, discharged from giving a verdict, the cause is continued until the next term. The entry on the record is that “J. S., one of the jurors, is, by consent of parties, and for reasons appearing to the court, ordered to be withdrawn, and the rest of the jury from giving their verdict are discharged.”

When the jury cannot agree, and yet the parties do not consent to withdraw a juror, and no cause for the court's interposition exists, the jury must be adjourned from day to day, with the court, (the time during the sitting of the court being passed in the jury-room, in

actual or supposed consultation,) until either they do agree, or the parties consent to withdraw a juror, or the term is ended. (1 Rob. Pr. (1st ed.) 354; Williams's Case, 2 Gratt. 568.)

3^d. The Verdict.

The verdict must respond substantially to *all the issues* to be tried; and to *the whole* of each issue; and if in this particular it be imperfect, it must generally be set aside, and a writ of *venire facias de novo* awarded. Hence, where in an action of debt on a bond against an executor, the defendant pleaded, (1st), Payment; and (2nd), Fully administered; upon which pleas issue was joined, and the jury found a verdict for the defendant, "*he having fully administered all the assets of his testator,*" &c., the verdict was set aside, and a *venire facias de novo* awarded, because there was no response to the plea of payment. (Brown, ex'or, v. Henderson, 4 Munf. 492; see also Hite's Heirs v. Wilson & als, 2 H. & M. 268.) And so, where a suit was brought against two persons, on a bond executed by both, and it abated as to one by his death, and the other pleaded *payment* generally, on which issued was joined, and the verdict found that "*the surviving defendant hath not paid,*" &c., it was held not to respond to the *whole* of the issue, which related to a payment made by *either obligor*, and a *venire facias de novo* was directed. (Triplett v. Micou, 1 Rand. 269.)

At common law, if there be several counts in a declaration, and one of them be faulty, and the verdict being for the plaintiff, does not ascertain (as generally it does not,) upon which of the counts it was founded, it is necessary to arrest the judgment, because it may be that the jury have based their verdict upon the faulty count. This principle is not illogical, although it would seem that it would have been not less logical to assume that the verdict was based upon the good count. At all events, the legislature has deemed it expedient so to provide, and it is accordingly enacted, that where there are several counts, one of which is faulty, the defendant (instead of demurring to it, as at common law would be proper,) may ask the court to instruct the jury to disregard it; yet if entire damages be given, the verdict shall be good. (V. C. 1873, c. 173, § 12.)

It may be added, that the verdict ought not to find matter *out of the issue*, although if it does, it will be considered *surplusage*, and be disregarded, (Garrard v. Henry, 6 Rand. 114, 118, 120; Austin v. Jones, Gilm. 341;) and that, in a few instances, a categorical response

to the issue is insufficient. Thus, an executor or administrator may plead to an action against him as such, that he had not at the commencement of the suit, nor at any time since, any goods or chattels of the decedent in his hands to be administered, which is called a plea of *plene administravit*, or *fully administered*. In an issue joined on this plea it is not enough for the verdict to ascertain that the defendant had assets at the institution of the suit, nor even that he then had enough to pay the plaintiff's debt, but it must ascertain the *value of the assets* then in defendant's hands; and if the verdict does not do this, there must be a *venire facias de novo*. (Booth's ex'ors v. Armstrong, 2 Wash. 301; Rogers v. Chandler, 3 Munf. 65; Eppes v. Smith, 4 Munf. 466; Sturdivant v. Raines, 1 Leigh, 481; Gardner v. Vidal, 6 Rand. 106.)

The principle first above stated, namely, that the verdict must respond substantially *to the whole of every issue*, is materially modified in Virginia by statute, in respect to the action of *detinue*. At common law, if in that action several things are demanded in one count of the declaration, and the jury find for the plaintiff *for part of them*, but say nothing as to the rest, the verdict is insufficient, because not responsive to the *whole issue*, and a *venire facias de novo* is requisite. (8 Th. Co. Lit. 496.) Our statutes, however, declare that in such a case the plaintiff shall be *barred as to the things omitted*, but the verdict shall be good. (V. C. 1873, c. 173, § 13.) And the same statute enacts that if the verdict omit the *price or value* of the articles found to be detained, the court may at any time have a jury impannelled to ascertain it, (Ibid); whilst at common law a *venire facias de novo* must have been resorted to. (Higginbotham v. Rucker, 2 Call. 313; Cornwell v. Truss, 2 Munf. 195.)

It should also be stated, in connexion with the action of *detinue*, that it is by statute made the duty of the jury, if they find *for the plaintiff* in that action, to assess the damages sustained by him, by the detention of the property. And if, on the other hand, they find for the *defendant*, and the property, in pursuance of the statute in question, has been for cause shown taken from the defendant pending the suit, because he is insolvent, and there is supposed to be reason to apprehend that it will be made away with, lost or damaged, they shall assess the damages sustained by the defendant by reason of such taking, and the value of the property; and in either case judgment is to be entered according. And

the statute further provides, in order to secure to the defendant the damages assessed in his favor by the jury, that no such taking is to occur at the instance of the plaintiff; unless he shall first give bond with good security to answer the damages to the defendant. (Acts, 1873-'4, p. 275-'6, c. 222.)

In respect to the allowance of interest in the verdict, it is to be observed that the common law does not, in general, *imply a promise* to pay interest, and consequently the jury are not warranted in allowing it, save when it is *expressly contracted for*, and when the declaration demands it, and save also, in the few excepted cases, where an engagement to pay it is assumed from the *usage of the parties*, or of the vocation in which one or both may be engaged, as upon bills of exchange, and promissory notes, where the obligation to pay interest arises from the custom and usage of merchants, who chiefly employ such securities. (1 Chit. Cont. 643-'4.)

Our courts in Virginia, with some aid from the legislature, have long established a different doctrine, namely, that it is *natural justice that he who has the use of another's money should pay interest on it*, (Jones' Ex'or v. Williams, 2 Call. 106) whether demanded *eo nomine* in the declaration or not, it being said to *follow the principal as the shadow follows the substance*. (Hatcher v. Lewis, 4 Rand. 157.) It has, consequently, been in most cases submitted to the *discretion of the jury* whether interest should be allowed or not. Still, this proposition was long confined to actions *ex contractu*, and did not hold in actions of *tort*. So that, when in Shanks v. Brugh, 5 Leigh, 598; in an action *ex delicto* (for a fraud) the jury rendered a verdict for damages, with *interest thereon from a designated time*, the allowance of interest on the damages, (although the jury might have calculated and added it *as damages*), was held to be *surplusage*, and judgment was entered for the damages only. See also to same effect, Hepburn & als. v. Dundas & als, 13 Grat. 219.

Our present statutes go yet further. They not only permit the jury, in an action *founded on contract*, to allow interest on the principal sum, or any part of it, and to fix the period when it is to begin, but the same discretion, (which is always a *judicial*, and *not an arbitrary* discretion,) is permitted likewise in actions for torts; and it is declared, that if a verdict does not allow interest, the sum founded shall bear interest from the date of the verdict, and judgment is to be entered accordingly. (V. C. 1873, c. 173, § 14.)

And let it be observed, that when the action is

founded upon a promise, express or implied, to pay money at a given day, interest on the principal sum from that day is a legal incident of the debt, and the right to it founded on the presumed intention of the parties. And it is further the established doctrine with us, that wherever there is thus a contract, express or implied, to pay interest, the obligation extends to the payment of the interest, as well as of the principal sum, and neither courts nor juries have, or ever had, the arbitrary power to dispense with the performance of either branch of the contract. (Chapman v. Shepherd, 24 Grat. 383-'4; Roberts v. Cocke, Va. Court of Appeals, Va. Law Jour., Mar. 1877, p. 174-'5; Cecil v. Hicks, Va. Court of Appeals, Va. Law Jour., Oct. 1877, p. 614.) The debtor may indeed, under peculiar circumstances, be excused from the payment of interest; but the burden of making those circumstances to appear is in all cases upon him. The creditor's absence in another country at the time the debt falls due, having no agent authorized to receive the money in the debtor's country, is a circumstance which thus excuses from the payment of interest; and although the mere existence of war neither abrogates debts, nor stops the running of interest on debts, (Ambler v. Macon, 4 Call. 605; Hawkins v. Minor, 5 Call. 118; Crenshaw v. Seigfreid, 24 Grat. 272; Roberts v. Cocke, Va. Court of Appeals, Va. Law Jour., Mar. 1877); yet when debtor and creditor are alien-enemies, or on opposite sides of hostile lines, no interest accrues. (1 Rob. Pr. (1st ed.) 363, 364; 2 Do. 205-'6; McCall v. Turner, 1 Call. 139-'40; Brewer v. Hastie, 3 Call. 24; Walker v. Beauchler, 27 Grat. 511; Fred v. Dixon, Id. 541; Roberts v. Cocke, Va. Court of Appeals, Va. Law Jour., Mar. 1877, p. 177.)

It should be mentioned also, that where a note is payable at a future day "*with interest*," the interest *runs from the date* unless a contrary intention appears. And it is held in Virginia that where extraordinary interest is legal if expressly stipulated for, an express promise to pay such extraordinary interest, unless it be plainly otherwise intended, will extend not only to the maturity of the note, but until it is paid. (1 Am. L. C. 497; Cecil v. Peery, Va. Ct. of Appeals, Va. Law Journal, March, 1877, p. 612. But see *contra* Brewster v. Wakefield, 22 How. 118; Burnhisel v. Pirman, 22 Wal. 170.)

Availing itself of the *discretion* supposed to be vested in juries touching the allowance of interest, the legislature has sought to give license to the court or jury which shall try the cause, in cases where the liability

arose prior to 10th April, 1865, "*to remit the interest*" upon the original debt for any portion of the period between 10th April, 1861, and 10th April, 1865. But this provision affecting, as it does, the established rights of the creditor, *impairs the obligation of the contract*, and is repugnant to the constitution of the United States, and therefore void. (U. States Const. Art. I, § X. 1; V. C. 1873, c. 173, § 14; Crenshaw v. Seigfreid, 24 Grat. 277; Roberts v. Cocke, Va. Court of Appeals; Va. Law Journal, March 1877, p. 177.)

Lastly, it must be observed, that the *effect* of contracts as touching the *rights of the parties*, is determined by the *lex loci contractus*, that is, *by the law of the place with reference to which the contract is made*, which, for the most part, is the place where it is to be performed. Hence, if the contract is to be *performed in New York*, interest is to be allowed or refused, and its amount determined, even in our courts, according to the law of New York. (Stor. Confl. Laws, § 304-'5; Bank of Marietta v. Pindall, 2 Rand. 472.)

It remains lastly, upon the subject of verdicts, to advert to *their form*. The great rule is, that the verdict must respond to the *whole of each issue*, and if damages are to be inquired of, must assess them. The forms of verdicts, in some of the most prominent cases, may be as follows:

In Debt on Penal Bond.

"We of the jury find for the plaintiff — dollars, with lawful interest thereon, from the — day of —, in the year of our Lord, 187 —, until paid."

In Debt on Bond with Collateral Condition.

"We of the jury find for the plaintiff, and assess his damages at — dollars, with lawful interest thereon, from the — day of —, in the year of our Lord, 187 —, until paid."

In Debt on Single Bill, or Promissory Note.

"We of the jury find for the plaintiff the debt in the declaration mentioned, [or — dollars, parcel of the debt in the declaration mentioned], with lawful interest thereon, from the — day of —, in the year of our Lord, 187 —, until paid."

If the debt be reduced by a *set-off*, deduct it from the amount due the plaintiff, and find the residue for the plaintiff, or find the whole debt with interest, and then say, "subject to a set-off of — dollars, to be allowed

as of the — day of —, in the year of our Lord, 187 —."

If the set-off *exceeds the plaintiff's demand*, it may be found in the manner last stated; but it is neater to ascertain *eo numero* to what sum the *defendant* is entitled, and to say, "we find for the defendant — dollars, with lawful interest thereon, from the — day of —, in the year of our Lord, 187—, until paid." (*Ante*, p. 660, 663; V. C. 1873, c. 168, § 9.)

In Debt on Negotiable Note Protested.

"We of the jury find for the plaintiff — dollars, [*amount of principal and costs of protest*,] with lawful interest thereon from the — day of —, in the year of our Lord, 187—, until paid."

In Debt on Foreign Bill of Exchange Protested. .

"We of the jury find for the plaintiff — dollars [*amount of principal, costs of protest, and damages*; V. C. 1873, c. 141, § 9, 11], with lawful interest on — dollars, [*costs of protest and principal*,] part thereof, from," &c.

In Covenant or Assumpsit.

"We of the jury find for the plaintiff, and assess his damages at — dollars, with lawful interest thereon, from," &c.

In Detinue.

"We of the jury find for the plaintiff, and fix the value of the said chattels as follows, viz., &c.; and we do assess the plaintiff's damages at — dollars, with lawful interest thereon, from," &c.

- *In Trespass, or for other Torts.*

"We of the jury find for the plaintiff, and assess his damages at — dollars, with lawful interest thereon, from," &c.

In a Writ of Inquiry.

"We of the jury assess the plaintiff's damages at — dollars, with lawful interest thereon, from," &c.

4th. Various Incidents which may attend the Trial.

The various incidents which may attend the trial are the following: (1), Bills of exception; (2), Instructions from the court to the jury; (3), Demurrer to evidence; (4), Special verdict; and (5), Case agreed. (St. Pl. 88 & seq; Id. (Tyler), 120 & seq);
W. C.

1^h. Bills of Exception.

In the brief reference already made to bills of exceptions, (*Ante*, p. 728,) we saw that in the progress of a trial there is room for many mistakes on the part of the judge who presides. Thus, he may admit illegal, and exclude legal evidence; he may instruct the jury erroneously as to the law; he may compel the party to proceed with the trial when he has shown legal and sufficient grounds for a continuance of the cause; he may improperly grant, or improperly overrule, a motion for a new trial; and in short, he may err in a great number of particulars besides. But of none of these incidents does the record proper, and by itself, take notice. The record proper, indeed, exhibits nothing but the formal allegations or *pleadings* on either side, the *issue*, the *impannelling of the jury*, the *verdict*, and the *judgment*,—the mere *lifeless skeleton*, as it were, of the cause. The occurrences in court during the trial,—all that impart life, animation, and interest to the proceedings,—are unnoticed. No vestige remains of the examination of the witnesses, the instructions and opinions of the court, or the behavior of the jury.

But either party may catch these incidents, “living as they rise,” and fix them in the record, so that they may be perused on review by an appellate court, (which can never look outside of the record for the history of the case); and if any error appears in the course of the proceedings, that court may reverse the judgment, and take the steps necessary to correct the wrong done.

For example, at the trial of the cause of Charles Creditor against David Debtor, let us suppose that the defendant has pleaded *payment* of the bond on which the action is founded, and issue is joined on that plea. The cause is called in its order on the docket, and the defendant says, that he is not prepared to go into the trial because a witness whose evidence is material is absent. He is sworn “true answer to make to such questions as the court shall propound.” The court then inquires whether the witness be material, and whether he has been duly summoned. Let us suppose the defendant to affirm the *materiality* of the witness, and to reply to the latter question, that a competent time before the trial, he got a *subpœna* from the clerk, and sent it by a friend who was going to the county seat of the county where the witness resided, and who promised to deliver it to the sheriff of that county; but whether it ever reached the

sheriff, or whether, if it did, he served it or not, he is unable to say. Let us next suppose the court to be of opinion that this was not sufficient diligence on the part of the defendant, to obtain the attendance of his witness, and consequently that the motion for a continuance must be overruled, and the defendant required to proceed with the trial, (Hewitt's Case, 17 Grat. 627.) • All these occurrences the record would pass over in silence, but if defendant's counsel thinks the court erred in its opinion, he can bring the facts *into the record*, so as to submit the correctness of the ruling to an appellate court, by means of a *bill of exceptions*, which would be in the form following:

FORM OF A BILL OF EXCEPTIONS ON A MOTION FOR A CONTINUANCE.

David Debtor	}	In Debt.	Be it remembered, That when this cause was called for trial, it being the first term at which it was on the court docket, upon an issue made up at the rules, the defendant, by his counsel, moved the court for a continuance of the cause until the next term, upon the ground that <i>George Roberts</i> , a material witness for him was absent, and thereupon the defendant, having been duly sworn, stated to the court that the said Roberts was a material witness to sustain the issue on his part, and that he could not safely go to trial without him; and further stated that at least four weeks before the sitting of this court he obtained a subpoena for the said witness, addressed to the sheriff of Augusta county where the said witness resides, and sent it to the said sheriff by the hands of a trustworthy messenger, one John Smith, who was going to the town of Staunton, the county-seat of Augusta county, and who promised to deliver the same within two days at farthest to the said sheriff; but whether the said John Smith did so deliver it to the said sheriff, or if he did, whether the said sheriff executed the same on the said witness, the said defendant was unable to say. It appeared that the said subpoena had not been returned by the said sheriff. But the court overruled the motion for a continuance for the cause aforesaid, and required that the defendant should proceed at once with the trial; to which opinion of the court the defendant by his counsel excepts, and prays that this his bill of exceptions may be signed, sealed, and made part of the record, which is done accordingly.
adā. Charles Creditor.			

(Signed by the judge,) J. J., {SEAL.}

The defendant being thus urged into a trial, may be supposed to produce in support of his plea of payment, a receipt purporting to be signed by the plaintiff, and witnessed by one *Samuel Williams*, for the whole amount of the debt. The defendant calls *Peter Grubbs* to prove the authenticity of this paper, by showing the signatures of both Williams and the plaintiff to be genuine. Plaintiff's counsel objects to such testimony, urging that the attesting witness is "*the best evidence*," and that he alone can be introduced to prove the paper. Defendant's counsel then proves that *Williams* now resides in Texas, and so is beyond the reach of any

process from a Virginia court, and contends that that fact justifies the introduction of the secondary proof in question. The plaintiff, however, still persists in his objection, which is overruled by the court, and Grubbs is allowed to testify to the genuineness of the receipt. Of all this the record of itself would say nothing, and a bill of exceptions must be employed to make these facts a part of the record, and to make them known to an appellate court. Accordingly, no sooner does the court announce its decision, than the counsel for the plaintiff respectfully declares his intention to *save the point*, (such is the phrase), by a bill of exceptions. The trial then comes to a pause whilst this interlude in the progress of the case is preparing, as follows:

BILL OF EXCEPTIONS UPON THE INTRODUCTION OF TESTIMONY. .

Charles Creditor.	}	In Debt.	<i>Be it remembered</i> , That on the trial of this cause the defendant, to sustain the issue on his part, offered in evidence a paper-writing, purporting to be a receipt signed by the plaintiff for the whole amount of the debt in this cause, which paper-writing is in the words and figures following, to wit:
vs. David Debtor.			

[*Here insert the receipt verbatim.*]

and offered to prove the execution of the same by a witness, one *Peter Grubbs*, who was not the attesting witness thereto, having first proved that *Samuel Williams*, the attesting witness, was not now a resident of Virginia, but of the State of Texas. To the introduction of this evidence, under the circumstances disclosed, the plaintiff's counsel objected, upon the ground that the non-residence of the attesting witness was not sufficient to justify the admission of any other testimony relative to the execution of the said paper writing, inasmuch as there appeared nothing to hinder the taking of the deposition of said attesting witness, notwithstanding such his non-residence. But the court overruled the said plaintiff's objection, and suffered the said Peter Grubbs to testify to the execution of the said paper-writing by the said plaintiff, and the same was thereupon submitted to the jury in evidence. And to this opinion of the court overruling the said objection, the plaintiff by his counsel excepts, and prays that this his bill of exceptions may be signed, sealed, and made part of the record, which is done accordingly.

(Signed by the judge.)

J. J.,

SEAL.

From these very simple instances of bills of exceptions, the student will perceive how important it is, in reference to the preparation of such instruments in the hurry of the trial, and amidst the tumult of the courtroom, to study clearness of apprehension, and the *habit* of ready and perspicuous statement. The skill of an instructed and intelligent lawyer is in few passages of professional life more called into requisition than in the prompt and accurate preparation of bills of exception in cases of complexity.

The practice is to give notice, at the time of the obnoxious ruling of the court, that the *point is to be saved*; and it is indispensable to give such notice at all events *before verdict*, although the bill of exceptions may be drawn up and signed at any time *during the term*. (Wash. & N. O. Tel. Co. v. Hobson, 15 Grat. 122, 138; Martz v. Martz, 25 Grat. 361; Peery v. Peery, 26 Grat. 323-'4.)

It is obvious, that there can be no occasion for a bill of exceptions in cases where there can be *no process of appeal* to a higher court. (Souther's Case, 7 Grat. 681.) Accordingly, our statute in Virginia, (taken substantially from the English statute 13 Edw. I, c. 31,) enacts, that in the trial of a case *at law*, in which *an appeal, writ of error, or supersedeas lies to a higher court*, a party may except to any opinion of the court, and tender a bill of exceptions, which (if the truth of the case be fairly stated therein,) the judge or justices, or the greater part of those present *shall sign*, and it shall be *a part of the record of the case*. (V. C. 1873, c. 173, § 18.)

The mode of *compelling* a judge to sign a bill of exceptions in pursuance of this requirement, is not altogether settled. It would seem that it should be by *mandamus* from the appellate court; but a *query* has been made in several cases about it. (Shanks v. Fenwick, 2 Munf. 478; Jackson's Adm'r v. Henderson, 3 Leigh, 196; Taliaferro v. Franklin, 1 Grat. 332, 336, 338; *Ex-parte* Crane, 5 Pet. 190; *Ante*, p. 330.)

The history and nature of bills of exception are discussed in the case of Taliaferro v. Franklin, 1 Grat. 332; and also in Money v. Leach, 3 Burr. 1692; St. Pl. 89, n (o); Id. (Tyler's Ed.) 121.

See generally upon the subject, 1 Rob. Pr. (1st ed.) 344.

If a bill of exceptions states the facts of the case so imperfectly or vaguely that the court cannot see the *exact state of the case*, nor ascertain precisely what it was that the court below determined, it is the settled practice to *reverse the judgment*, as being the safer course. (Barrett & Co. v. Tazewell, 1 Call. 216; Beattie v. Tabb, 2 Munf. 254; Brooke v. Young, 3 Rand. 106; Raines v. Philips, 1 Leigh, 483; Thompson, v. Cumming, 2 Leigh, 321; Bowyer v. Chesnut, 4 Leigh, 1.)

It is held, strangely enough, that one bill of exceptions cannot be referred to in order to supply an omission in another, unless such reference be made in one of the bills; and that notwithstanding the bills are all *parts of the record in the same case*. (Brooke v. Young,

3 Rand. 106; *Spencer v. Pilcher*, 8 Leigh, 566; *Perkins v. Hawkins*, 9 Grat. 649.)

Where the ground of complaint is that evidence or pleas have been *improperly excluded*, the bill of exceptions must show affirmatively *the relevancy* of the evidence, and the *propriety* of the pleas; or else an appellate court, perceiving *what the action of the court below was*, and not discovering that it was wrong, will *presume it to have been right*. (*Courtney v. Com'th*, 5 Rand. 666; *Rowt's Adm'r v. Kile's Adm'r*, 1 Leigh, 216; *White v. Toncray*, 9 Leigh, 347; *Herrington v. Haskins' Adm'r*, 1 Rob. 591; *Bowyer v. Hewitt & als*, 2 Grat. 193; *Johnson v. Jennings*, 10 Grat. 1; *Fitzhugh v. Fitzhugh*, 11 Grat. 301; *Dickinson v. Dickinson & Co.*, 25 Grat. 324; *Stoneman's Case*, Id. 898.)

Bills of exception where the complaint is that a new trial has been granted or denied improperly, must state the *facts proved*, and not merely the evidence *tending to prove them*. (*Ewing v. Ewing*, 2 Leigh, 337; *Rohr v. Davis*, 9 Leigh, 30; *Green v. Ashby*, 6 Leigh, 135; *Pasley v. English*, 5 Grat. 141; *Forkner v. Stuart, &c.*, 6 Grat. 197; *Wash. & N. O. Telegraph Co. v. Hobson*, 15 Grat. 122; *Harnsberger's Adm'r v. Kinney*, 6 Grat. 287.) If this rule be not observed, the appellate court will take no cognizance of the case, unless after rejecting all the evidence in favor of the party excepting, and giving full credit to that of the other, the decision of the court below appears to be erroneous. (*Noyes v. Humphreys*, 11 Grat. 651; *Farish & Co. v. Reigle*, 11 Grat. 720; *Carrington v. Goddin*, 13 Grat. 587.)

If indeed there be no conflict of evidence, a statement *of the evidence* is a statement *of the facts*, and will be so regarded. (*Mays v. Callison*, 6 Leigh, 230.) And on the other hand, where the evidence is contradictory, the court may, for that reason, decline to state either it or the *facts* it considered proved. (*Grayson's Case*, 6 Grat. 721.)

A different practice seems to be proper when, in pursuance of V. C. 1873, c. 158, § 36, the parties waive a trial by jury, and submit the whole matter of law and fact to the court. An exception taken to the judgment of the court must state, not the *facts proved*, but the *evidence* to be reviewed in the higher court, it is said, as a *demurrer to evidence*, (*Hodge v. First Nat. Bank*, 22 Grat. 51); but it may be still worthy of consideration whether it is not more consonant to the policy of the legislature to regard the higher court as charged with a contemplation of the evidence *as if on appeal*. (*Wickham v. Lewis Martin & Co.*, 13 Grat. 446, *Daniel, J.*; *Rep.*

of Revisors Code of 1849, p. 16. See *Pryor v. Kuhn*, 12 Grat. 615.)

2^h. Instructions from the Court to the jury.

It often happens in the progress of a trial, that one or other of the parties desires the court to instruct the jury as to the law, which in England it is *usual*, and with us *lawful* for the court to do, although not requested on either side. (3 Bl. Com. 375; *Gwatkin's Case*, 9 Leigh, 678); but according to our practice, a judge is *not obliged* to give an instruction unless desired so to do by one or other of the parties. (*Rosenbaum v. Weeden*, 18 Grat. 785); and although instructions are usually postponed until the jury are about to retire, it is yet in the discretion of the court to give them before the argument is commenced, or after it is concluded. (*Balt. & O. R. R. Co. v. Polly*, 14 Grat. 447; and when given, they are not to be controverted by counsel, at least in a *civil case*. (*Davenport v. Com'th*, 1 Leigh, 588; *Delaplane v. Crenshaw*, 15 Grat. 457); although it seems the better opinion, that in *criminal cases* a greater latitude of discussion must be allowed. (*Garth's case*, 3 Leigh, 770; *Blunt's case*, 4 Leigh, 691; *Gwatkin's case*, 9 Leigh, 681.)

It is the established doctrine, that whilst on the one hand the judge may not withhold instructions when asked for, provided they are relevant to the cause, and not merely on *abstract points of law*, (*Brooke v. Young*, 3 Rand. 106; *Caton, &c. v. Lenox*, 5 Rand. 31); it is error on the other to give them if they are irrelevant, (*Johnson v. Jennings*, 10 Grat. 13; *Kincheloe v. Tracewells*, 11 Grat. 587), or upon abstract questions of law not based upon any evidence in the cause, and calculated to mislead the jury. (*Pasley v. English*, 10 Grat. 236; *Rea v. Trotter*, 26 Grat. 594.)

If there is *any evidence* in the cause, though it be slight, to which the instruction is applicable, and it propounds the law correctly, it should be given. (*Farish & Co. v. Reigle*, 11 Grat. 697; *Early v. Garland*, 13 Grat. 1; *Hopkins v. Richardson*, 9 Grat. 486.)

Instructions ought to be asked upon *specified points, clearly expressed*, and not generally, upon an entangled mass of evidence. (*McRae v. Scott*, 4 Rand. 463; *Kitty v. Fitzhugh*, 4 Rand. 600; *Levasser v. Washburn*, 11 Grat. 572; *Kincheloe v. Tracewells*, 11 Grat. 587; *Harvey v. Epes*, 12 Grat. 183.) And the court may refuse to give an instruction for the reason that it is expressed so obscurely or ambiguously as to leave in doubt the meaning intended to be conveyed. (*Levasser v. Washburne*, 11 Grat. 572; *Kincheloe v. Tracewells*, 11 Grat.

587; Va. Cent. R. R. Co. v. Sawyer, 15 Grat. 230; Boswell's case, 20 Grat. 860); unless the jury might be misled by the refusal, in which case the court rejecting the ambiguity ought plainly and distinctly to state the law applicable to the case. (Balt. & O. R. R. Co. v. Polly, 14 Grat. 447; Peshine v. Shepperson, 17 Grat. 472; Millar v. Kephart, 28 Grat. 1; Ward v. Churn, 18 Grat. 801.)

It may be added that the court should confine itself, in giving instructions, rigorously to an exposition of the *law of the case*; and if it trenches upon the province of the jury, by commenting upon the *weight of evidence*, it is error, for which the judgment must be reversed. (McDowell's Ex'or v. Crawford, 11 Grat. 377.)

Where instructions are refused, when they ought to be given, or where, in the opinion of the party against whose interest they operate, they are erroneous, his proper course is to introduce into the record, by means of a *bill of exceptions*, the circumstances under which the instruction was asked, the instruction itself, and the opinion of the court complained of. Then the appellate court is enabled to review the decision, and to determine upon its correctness.

3^d. Demurrer to Evidence.

A party proposing to dispute the legal force and effect of the evidence offered by his adversary, may *demur to the evidence*. A demurrer to evidence is closely analogous to a demurrer to pleading. As a demurrer to pleading imports, according to its etymology, (from Latin *demorari*, or French *demorrrer*, to "wait or stay,") that the objecting party *will not proceed* with the pleading, because *no sufficient statement* has been made on the other side; but will wait the judgment of the court, whether he is bound to answer; so a demurrer to evidence declares that the *demurrant* will not proceed, because the *evidence* offered on the other side *is not sufficient* to maintain the issue, and proposes to submit the cause to the judgment of the court, upon the ground of the insufficiency of the evidence. (St. Pl. 90; Id. (Tyler's Ed.) 121-'2.)

A demurrer to evidence is rarely a safe proceeding. The practice in Virginia (unlike that prevailing in England, and in many of these States,) is not to discharge the jury from giving any verdict, but to allow them to find one, *subject to the decision of the court* upon the demurrer. The *evidence* given in the cause, on both sides, is stated in the demurrer. The party demurring (whom we may call the *demurrant*,) is then considered

as admitting the truth of all his adversary's evidence, and all just inferences which can properly be drawn therefrom by a jury, and as waiving all his own evidence which conflicts with that of his adversary, and all inferences from his own evidence, (although not in conflict with his adversary's,) which do not *necessarily* result therefrom; and upon the basis of these suppositions, it is submitted to the court to determine which party is entitled to judgment. (Whittington v. Christian, 2 Rand. 357; Green v. Judith, 5 Rand. 1; Hansbrough's Ex'or v. Thorn, 3 Leigh, 147; Clopton's Adm'r v. Morris & als, 6 Leigh, 278; Tutt v. Slaughter's Adm'r, 5 Grat. 364.) In Hansbrough's Ex'or v. Thorn, 3 Leigh, 147, there is an instructive comparison between the English and the Virginia practice. See Gibson & al v. Hunter, 5 Taunt. 187, 198, 200, 205 & seq.

From this statement it is obvious that a party can never afford to demur to the evidence, except upon the *extreme weakness* of the adversary's case, and especially can he not afford to demur when his own case depends on testimony *in conflict* with that of the adversary. (Trout v. Va. & Tenn. R. R. Co., 23 Grat. 640 & seq.)

Either party, *plaintiff or defendant*, has a right to demur to the evidence, and the other party will be compelled to join therein, unless the case be plainly against the demurrant, and his object in demurring seems to be clearly *nothing else but delay*. (Whittington v. Christian, 2 Rand. 357; Rohr v. Davis, 9 Leigh, 30; Hyers v. Green, 2 Call. 556; Boyd's Adm'r v. City Savings Bank, 15 Grat. 501; Trout v. Va. & Tenn. R. R. Co., 23 Grat. 636 & seq; 3 Th. Co. Lit. 441; Bac. Abr. Pleas, (N).) It needs hardly to be observed, however, that as the plaintiff has most frequently the burden of proof upon him, (because he has commonly the *affirmative* of the issue,) the defendant will be the most frequent *demurrant*.

According to our practice, as already observed, the jury is not discharged, as in England; but they generally find a verdict, subject to the demurrer to evidence. If the jury assess damages for the plaintiff, thus hypothetically, and upon considering the demurrer, the court is of opinion that the plaintiff has cause of action, but that the damages are excessive, the verdict may be set aside, and a writ of inquiry awarded. (Briggs v. Hall, 4 Leigh, 493; Humphrey's Adm'r v. West's Adm'r, 3 Rand. 516.) And so, in every case

where the court, if it followed the hypothetical verdict, must pronounce what the evidence contained in the demurrer to evidence shows to be an unjust judgment, it may set the verdict aside, and call another jury to ascertain upon the adjudged merits of the case, the *quantum* of recovery. (Fairfax, Adm'r, v. Lewis, 11 Leigh. 283.)

See further as to demurrer to evidence, Ware v. Stephenson, 10 Leigh, 155; Dishazer v. Maitland, 12 Leigh, 524.

In order to make the mode of procedure more intelligible, the form of a demurrer to evidence is subjoined. The student will observe that it sets out the *whole evidence* on both sides, and not merely *the facts* which the evidence is supposed to establish.

FORM OF DEMURRER TO EVIDENCE.

David Debtor	}	In Debt.	And the said plaintiff, by his counsel, produces to the jury to maintain the issue on his part the following evidence, namely :
ads.			
Charles Creditor.			

[Insert plaintiff's evidence, as delivered by the witnesses, and in writings.]

And the said defendant, by his counsel, produces to the jury to maintain the issue on his part the following evidence, namely :

[Insert the defendant's evidence, as delivered by witnesses, and in writings.]

And the said defendant says, that the aforesaid matter, to the jurors aforesaid, in form aforesaid, shown in evidence, is not sufficient in law to maintain the issue joined on the part of the said plaintiff, and that he, the said defendant, is not obliged by the law of the land to answer the same; and this he is ready to verify. Wherefore, for want of sufficient matter in that behalf, shown to the jury in evidence as aforesaid, the said defendant prays judgment, and that the jurors aforesaid be discharged from giving any verdict on the said issue, and that the plaintiff be barred, &c.

And the form of the joinder in demurrer to evidence is as follows :

Charles Creditor	}	In Debt.	And the said plaintiff says, that the matters aforesaid, to the jurors in form aforesaid, shown in evidence, are sufficient in law to maintain the issue joined on the part of the said plaintiff. Wherefore, forasmuch as the said defendant hath given no answer to the same, the said plaintiff demands judgment, and that the jury be discharged, and that the defendant be convicted, &c.
vs.			
David Debtor.			

Lastly, upon the subject of demurrer to evidence it may be observed, that it must of course be postponed until the evidence, at least on the *demurres's* side, has been submitted, and sometimes the *demurrant* does not see his way clear to demur until the *discussion* is over.

4^h. Special Verdict.

A more common, because a more convenient course

than by demurrer to evidence, in order to determine the *legal effect* of the *facts proved*, is to obtain from the jury a *special verdict* in lieu of that general one of which the form has been already described. For the jury have an option, instead of finding the *negative or affirmative of the issue*, as in a general verdict, to find *all the facts of the case as disclosed upon the evidence before them*, and after so setting them forth to conclude to the effect following: "That they are ignorant in point of law on which side they ought, upon these facts, to find the issue; that if, upon the whole matter, the court shall be of opinion that the issue is proved for the plaintiff, they find for the plaintiff accordingly, and assess the damages at such a sum, &c.; but if the court be of an opposite opinion, then they find for the defendant." This form of finding is called a *special verdict*. In point of fact, however, the jury have nothing to do in general with the *formal* preparation of the special verdict. When it is agreed that such a verdict shall be given, the jury merely declare their opinion as to any fact remaining in doubt; and then the verdict is adjusted, *as to form*, by the counsel on both sides, without the further interposition of the jurors, save only to assent to it, the judge supervising. The special verdict is then entered *on the record*; and the question of law arising on the facts found is argued before, and decided by the court as in case of demurrer. And if either party be dissatisfied with the decision he may resort to a writ of error, and an appellate court. (St. Pl. 91; Id. (Tyler's Ed.) 122.)

It is to be observed, that it is entirely in the *option of the jury*, whether their verdict shall be general or special. The party who objects in point of law cannot therefore *insist* on having a special verdict; and if he wishes to put the legal question *on record*, (which is needful in order that the decision of an appellate court may be obtained upon it,) he must either *demur to the evidence*, or propound *instructions* to be given by the court to the jury, setting forth the law, if the jury believe such and such facts to be proved; or according to the practice in Virginia, (although not in England, where a *special case* (or case agreed,) is not entered on the record, with the *consent of the adversary*, a case may be agreed. (St. Pl. 92-'3; Id. (Tyler's Ed.) 123.)

A special verdict finds *all the facts* supposed to belong to the case, referring to the court the conclusion of law thence arising; and it is not sufficient to find the *evidence* from which the *jury* might have inferred

facts. It is an inflexible rule that the court upon a special verdict *can infer no facts whatsoever* from those found. How strong soever the *evidence* may be to prove a material fact, it will not avail. The *fact itself* must be determined by the jury. (McMichen v. Amos, 4 Rand. 137; Brown v. Ralston & als, 4 Rand. 504; Stribling v. Bank of the Valley, 5 Rand. 159.) This proposition, however, does not prevent the court from deriving *inferences of law* from the facts found, nor from giving their legal construction and effect to written documents. (Gibson v. Bristow & als, 1 Call. 62; Chapman v. Armistead, 4 Munf. 382; Blank's Adm'r v. Foushee, 4 Munf. 61.)

If a special verdict be so vague and uncertain as not to disclose the merits of the case, and to endanger the court's mistaking the meaning of the jury, or if important facts are omitted, apparently through inadvertence, which it is probable may be supplied, a *venire facias de novo* should be awarded, (McLean v. Copper, 3 Call. 367; Goosley v. Holmes, 3 Call. 424; Clay v. Ransom, 1 Munf. 454; Tunnell, &c. v. Watson, &c., 2 Munf. 283; Geddy v. Butler, &c., 3 Munf. 345; Robinson's Adm'r v. Brock, 1 H. & M. 213; Cropper v. Calton, &c., 6 Munf. 277; Brown & als v. Ralston & als, 4 Rand. 504.) But where the verdict is certain and unambiguous, and the plaintiff's case appears from it to be defective, judgment must be given for the defendant. (Brown & als v. Ferguson, 4 Leigh, 37.)

From what has been said it is apparent that a special verdict differs from a demurrer to evidence in two marked particulars, viz:

(1), A special verdict ascertains the *facts proved*; the demurrer to evidence recites the *whole evidence* adduced. See Henderson v. Allen, 1 H. & M. 235; Blank's Adm'r v. Foushee, 4 Munf. 61; Chapman v. Armistead, 4 Munf. 382; Brown & als v. Ralston & als, 5 Rand. 504;

(2), In a special verdict no inferences whatsoever as to *matter of fact*, but only inferences of *law*, and of legal construction, are allowable; whilst in a demurrer to evidence, it is the court's duty to draw from the demurree's evidence all just inferences such as a jury *might draw*, and from the demurrant's evidence not in conflict with that of the demurree, such inferences as a jury *must draw*. (Tunnell, &c. v. Watson, 2 Munf. 283, and cases there cited. Bolling v. Mayor of Petersburg, 3 Rand. 563; Layne v. Norris' Adm'r, 16 Grat. 236; Turner v. Smith, 18 Grat. 833.)

5^h. Case Agreed, or Special Case.

A *case agreed*, or a *special case*, or a *general verdict*, subject to a *special case*, (for by all these names it is known), is a written statement of *all the facts* in the case, drawn up for the opinion of the court, by mutual agreement of the counsel on either side; and it closely resembles, in the rigorous construction which is put upon it, the *special verdict*. Thus, it admits of no inferences of *fact* from the facts agreed, but like the special verdict, does allow of *legal conclusions* being derived from the facts, (*Sawyer v. Corse*, 17 Grat. 230; *Ramsey's Adm'r v. McCue, &c.*, 21 Grat. 353; See *McMichen v. Amos*, 4 Rand. 137.)

The *case agreed*, however, may occur at any time after the suit is instituted, as well before as after issue joined, whilst a *special verdict*, of course, supposes that the case has been regularly matured, and, for the most part, that an issue has been joined, which the jury is sworn to try. Some diversities may grow out of this difference worthy to be noted. Thus, where the case is agreed *before defendant pleads*, the agreement cures the want of a plea, and the cause is submitted to the court upon the agreed facts, without reference to any particular *form of defence*; the general question to be determined being whether the plaintiff, upon the whole case as stated, ought to recover; but where an *issue has been joined* when the case is agreed, the decision must be restricted to the issue. (*Sawyer v. Corse*, 17 Grat. 230.)

In England there is an important diversity between a *special verdict* and a *case agreed*, which appears not to be known in our practice, namely, that whilst a special verdict is *entered on the record*, a case agreed *is not*, and therefore a cause cannot there be taken, upon a *case agreed*, to an appellate court. (St. Pl. 93; *Id.* (Tyler's Ed.) 124.) No such distinction exists in Virginia. The *case agreed* is as much entered on the record as a special verdict, and as much admits of a reversal of the judgment in an appellate court. (*McMichen v. Amos*, 4 Rand. 137; *Sawyer v. Corse*, 17 Grat. 230; *Ramsey's Adm'r v. McCue*, 21 Grat. 353.)

It is to be observed, that a marked distinction exists between a special verdict and a case agreed, on the one side,—which admit, as we have seen, of *no inferences* whatsoever of *matter of fact*,—and on the other, a *waiver of a jury*, where, in pursuance of the statute to that effect, (V. C. 1873, c. 158, § 36,) the parties submit the whole case to the decision of the court, upon a

statement of the facts as agreed, in which case the court may make any legitimate inferences, just as a jury might. (Dearings' Adm r v. Rucker, 18 Grat. 426; Hodge v. First Nat. Bank, 22 Grat. 51; Wickham v. Lewis Martin & Co. 13 Grat. 446; Rep. of Rev'rs, Code, 1849, 816.)

5th. The Modes of *Avoiding the Effect of a Verdict*.

As soon as the facts of the case are ascertained by the trial, the *judgment of the court*, which is the conclusion of law from the facts, ought in due course to follow. There are, however, certain proceedings which, after the verdict or other mode of trial, may be taken by the unsuccessful party, in order to avoid the effect of the verdict, &c., and those proceedings now claim attention. They are as follows, viz :

- (1), A motion for a new trial ;
- (2), A motion in arrest of judgment ;
- (3), A motion for a repleader ;
- (4), A motion for a judgment *non obstante veredicto* ;
- (5), A motion for a writ of *venire facias de novo* ;

W. C.

1st. Motion for a *New Trial*.

The exercise of the superintending power of a court, in setting aside the verdict of a jury and granting a new trial, is comparatively of modern date, although, for *misbehavior* of the jurors, instances of it occur in the year-books of the reigns of Edward III, Henry IV, and Henry VII; and for *excessive damages*, surprise, fraud, or a verdict notoriously *contrary to evidence*, it became the practice to grant a new trial about the middle of the seventeenth century. (3 Bl. Com. 387-'8.)

Formerly, the principal remedy in order to do away with a verdict unduly given was by *writ of attain*, which was neither more nor less than a *prosecution for perjury*, which, says Blackstone, "shows the ignorance and ferocity of the times, and the simplicity of the points then usually litigated in the courts of justice;" it being supposed that the law being told to the jury by the judge, the proof of *fact* must always be so clear that, if they found a wrong verdict, they must be wilfully and corruptly perjured; a conclusion which must also have been aided by the fact, that jurors at an early period were *recognitors*, sworn to *recognize* what was the fact, *of their own knowledge*. (3 Bl. Com. 388 & seq; 402 & seq.)

Such a remedy as this, which laid the party injured by the verdict under the insufferable hardship of convicting the jurors for perjury, as the condition of redress, was in fact no remedy; and the courts by degrees

fell into the custom of exerting the *equitable authority*, (which is or ought to be in every tribunal, to prevent its procedure from being perverted to inflict a great and otherwise remediless wrong,) to set aside a verdict clearly unwarranted by the testimony, or otherwise grossly contrary to right.

A motion for a new trial is addressed to the court which tried the cause; and is an appeal to the *equitable* discretion of the court to prevent a *palpable and material* wrong. The motion, therefore, is never to be granted if the court conceives that the *substantial legal justice* of the case has been reached, notwithstanding irregularities may have occurred; nor is it to be granted where the failure of justice has not been *palpable*; nor where the wrong done, however palpable it may be, is *trivial in extent*. The court does not exercise a *power of appeal* from the jury, but interposes its *equitable authority* to prevent the jury from inflicting by their verdict a gross, material, and palpable wrong. (Patterson v. Ford, 2 Grat. 19; Powell, &c. v. Manson, 22 Grat. 192; Hilb v. Peyton, Id. 568, 589-'90.)

The motion for a new trial ought to be made before a judgment is entered upon the verdict; but it is not too late to make the motion at any time before the end of the term, although judgment has been entered; for the court at any time during the term may set the judgment aside. But after the term is ended, if judgment has been entered, it is too late to ask for a new trial. Nor can the court give leave to counsel until the next term, to prepare a bill of exceptions, if judgment is entered. (Winston v. Giles, 27 Grat. 530.)

1st. The Principal Grounds for a New Trial.

The principal grounds for a new trial with us are the following, viz:

- (1), That the verdict is contrary to the evidence;
- (2), That the damages awarded by the jury are *excessive*, or are *manifestly too small*;
- (3), That new evidence has been discovered since the former trial, which was not then attainable;
- (4), That some surprise or mistake occurred at the trial;
- (5), Misbehavior of the jury, or gross mistake as to its duty;
- (6), Fraud or other misconduct of the successful party;
- (7), Mistake of the court in point of law by misdirection of the jury, &c.;

W. C.

1^k. Motion for a New Trial on the ground that *the Verdict is contrary to the Evidence*.

A motion for a new trial on this ground must be founded, of course, on the evidence actually adduced at the former trial, exclusive of all other; and it is, therefore, inadmissible to introduce in support of the motion the affidavits of other persons not then examined. (*Street v. St. Clair*, 6 Munf. 437.)

The motion ought not to be sustained unless the verdict be *plainly wrong*; not in a doubtful case, because the judge, if on the jury, would have given a different verdict; for that would be to usurp the province of the jury. (*Ross v. Overton*, 3 Call. 309; *Brugh v. Shanks*, 5 Leigh, 598; *Mays v. Callison*, 6 Leigh, 230; *Brown v. Handley*, 7 Leigh, 119; *Mahone v. Johnston*, 7 Leigh, 317; *Parsons' Case*, 2 Rob. 772, 790; *Patterson v. Ford*, 2 Grat. 18; *Bell v. Alexander*, 21 Grat. 1; *Blosser v. Harshbarger*, 21 Grat. 214.) And this proposition applies *a fortiori* to an appellate court, which has not the advantage possessed by the judge who presides at the trial, of seeing and hearing the witnesses and observing their comparative intelligence, and their demeanor. (*Patterson v. Ford*, 2 Grat. 18; *Grayson's Case*, 6 Grat. 712; *Kate's Case*, 17 Grat. 561; *O'Neale's Case*, 17 Grat. 582; *Kemp's Case*, 18 Grat. 977; *Blosser v. Harshbarger*, 21 Grat. 216.)

If the evidence be *contradictory and conflicting* it is seldom proper to set a verdict aside for this cause, the jury being esteemed peculiarly competent to estimate the relative credibility of witnesses. (*Shanks v. Fenwick*, 2 Munf. 478.) And on the other hand, when there is no question *about the facts*, but only as to the proper inferences thence arising, the court is at liberty to exercise its own judgment more freely, and may properly grant a new trial, if the facts be supposed to justify conclusions different from those of the jury. (*Fisher v. Vanmeter*, 9 Leigh, 16; *Slaughter's Adm'r v. Tutt*, 12 Leigh, 159; *Downer v. Morrison*, 2 Grat. 237.)

We have seen (*ante*, 746), that where a party conceives himself aggrieved by the grant or the denial of a new trial, the bill of exceptions to the opinion of the court must state the *facts proved*, and not the evidence tending to prove them, (of the credibility of which the appellate court can form no trustworthy opinion), and that, if the *evidence* merely is stated, the appellate court will decline to consider

the case. If, however, upon the *written evidence*, (the effect of which the court will always undertake to determine), and the parol evidence of the *appellee*, supposing the latter to be *all true*, the verdict appears to be erroneous, the judgment is to be reversed and a new trial granted. (*Pasley v. English*, 5 Grat. 141; *Noyes v. Humphreys*, 11 Grat. 336.)

The application for a new trial being addressed to the equitable discretion and authority of the court, in order to prevent a material and manifest injustice, the court, as the alternative of a new trial, may impose terms upon the party, requiring him to consent to such a modification of the verdict as will meet the substantial justice of the case, [*e. g.* to reduce the recovery, &c.]; the new trial to be granted, if he does not consent. (*Jas. Riv. & Ka. Co. v. Adams*, 17 Grat. 427.)

2^k. Motion for a New Trial on the Ground that the Damages awarded by the jury are *excessive*, or are *manifestly too small*.

This is a branch of the first ground for a new trial; for if the damages be either excessive or too small, the verdict must be *contrary to the evidence*. It is desirable, however, to place it under a distinct head, because the estimation of damages is peculiarly within the province of the jury, they being considered especially competent to determine such matters; and, therefore, it is particularly incumbent upon the court to forbear any encroachment upon the function of the jury; in this particular, save in the strongest cases of injustice. No mere *difference of opinion*, however decided, justifies an interference with the verdict for this cause; but the amount must be so out of the way as to *evinced passion, prejudice, partiality, or corruption* in the jury. (6 Com. Dig. 227, Plead. (R. 17); *Coleman v. Southwick*, 9 Johns. (N. Y.) 45; *McConnell v. Hampton*, 12 Johns. (N. Y.) 234.)

Upon a motion to grant a new trial for this cause, the court may impose upon the successful party the alternative of remitting such portion of the damages as justice shall require, or of a new trial. And it is not error to cause the jury to report to the court the items which constituted the elements of their verdict, in order to enable the judge to determine how much should, in justice, be released. (*Jas. Riv. & K. Co. v. Adams*, 17 Grat. 427, 434.)

There has been never a doubt that the power to

grant new trials for *excessive damages* exists at common law, as well in actions *ex delicto* as in actions *ex contractu*; but *smallness of damages* seems not to have been ground for a new trial, at least in actions of *trespass*, until it was made such by statute. (V. C. 1873, c. 173, § 15; Jackson v. Boast, 2 Va. Cas. 49; Rixey v. Ward, 3 Rand. 52; Humphrey's Adm'r v. West, 3 Rand. 516; 6 Com. Dig. 227, Plead. (R. 17).)

3^k. Motion for a new Trial on the ground that *New Evidence has been Discovered* since the Former Trial.

A new trial is granted on the ground of *after discovered evidence*, not without great reluctance, and never except under *very special circumstances*, which have been thus summed up, (Thompson's Case, 8 Grat. 637; Read's Case, 22 Grat. 946; 3 Whart. Am. Crim. Law, § 3101), viz:

(1), The evidence must appear to have been discovered since the former trial.

This is usually shown by the affidavit of the party, which is to be credited, unless something appears to discredit it. (Cases *Supra*, Thompson's Case, 8 Grat. 637; Read's Case, 22 Grat. 946.)

(2), It must appear that the evidence is such that reasonable diligence on the part of the applicant could not have secured it at the former trial. (Cases *supra*; Thompson's Case, 8 Grat. 637; Read's Case, 22 Grat. 946; DeLina v. Glassell's Adm'r, 4 H. & M. 309; Callaghan v. Kippers, 7 Leigh, 608; Brown v. Speyers, 20 Grat. 296; Williams v. Baldwin, 18 Johns. (N. Y.) 489.)

Reasonable opportunity is always afforded by continuing the cause, in order to obtain testimony, and if the party has slighted such opportunity, and been wanting in diligence, either in searching for evidence or in bringing it to court, he must lie down under the disadvantage which his own remissness has brought upon him. A new trial cannot be obtained. Even where, under the advice of counsel that certain witnesses were unnecessary, he omitted to summon them, and at the trial they proved to be required, so that a verdict was obtained against him, a new trial was refused. (Pleasants v. Clements, 2 Leigh, 470.)

(3), The evidence must be *material* in its object, and not merely *cumulative and corroborative* nor *collateral*. (Cases *Supra*; Thompson's Case, 8 Grat. 637; Read's Case, 22 Grat. 946; Brown v. Speyers, 20 Grat. 305; Cody v. Conly, 27 Grat. 313.)

And in order to afford proper assurance of the character of the newly-discovered evidence, the substance thereof must be sworn to by the *witnesses themselves*, or by some one who has *heard their statements*. (Nuckols' Admr v Jones, 8 Grat. 267; Brown v. Speyers, 20 Grat. 304.)

And as the new evidence must not be *collateral*, it will not avail if it only tends to *discredit an opposing witness*, who was examined at the former trial. (Brugh v. Shanks, 5 Leigh, 598; Thompson's Case, 8 Grat. 637; Brown v. Speyers, 20 Grat. 305; Read's Case, 22 Grat. 946.)

(4), The evidence must be such as *ought to produce*, on another trial, an opposite result *on the merits*. (Thompson's Case, 8 Grat. 637; Read's Case, 22 Grat. 946; Cody v. Conly, 27 Grat. 324.)

It is a possible case that the newly discovered evidence, although coming fully up to these very rigorous, although very reasonable requisites, is not brought to light until judgment is pronounced upon the verdict, and the *term of the court is ended*. It is then too late to ask the court of law for a new trial; but the party being remediless at law is for that reason to be entertained in a court of equity, which will *enjoin* the successful party from availing himself of his judgment, and compel him to submit to a new trial, usually at the bar of the court of law (which tries the case as a new one sent to it from the court of equity); and if the applicant prevails upon the new trial thus ordered, the court of equity *perpetuates the injunction*. And so equity will intervene in other cases where verdicts have been obtained which in justice ought to be set aside, but which courts of law are disabled by their rules to interfere with, provided the applicant has been guilty of no *laches* or default, and has done everything that could reasonably be required of him, in order to obtain relief at law. (2 Rob. Pr. (1st. ed.) 213; Hord v. Dishman, 5 Call. 729; Faulkner's Adm'r v. Harwood, 6 Rand. 125; Pleasants v. Clements, 2 Leigh, 474; Fouchée v. Lea, 4 Call. 279; Knifong v. Hendricks, 2 Grat. 212; Green & Suttle v. Massie, 21 Grat. 358; Adams v. Hubbard, 25 Grat. 132.)

4*. Motion for a New Trial on the Ground of *Surprise at the Trial*.

In case of a party's being *surprised* at the trial by some circumstance or accident which he could not foresee, and which involves on his part *no de-*

fault whatsoever, he may often obtain a new trial. As for example, where he is taken sick on his way to the trial of the cause, and is thereby prevented from making affidavit to the loss of original deeds, and in consequence of the want of such affidavit, the court refused to receive copies in evidence, so that an adverse verdict is rendered. (Hord v. Dishman, 5 Call. 279; Harnsbarger v. Kinney, 6 Grat. 287.)

But no one can affect to say he is *surprised* by a state of things which a proper diligence on his part would have prevented. He cannot even allege, as a surprise, the consequence of a mistake of his counsel as to a question of law, or as to the occasion for certain witnesses. (Law v. Law, 2 Grat. 366; Pleasants v. Clements, 2 Leigh, 474.)

An important diversity is to be noted between applications for a new trial on the ground of *surprise*, when made by the plaintiff, and when made by the defendant. The plaintiff, if surprised by a new aspect of the case, or by the production of evidence not before suspected, or otherwise, generally may and ought to suffer a *non-suit*; and if he omits to do so, he cannot pretend to ask for a new trial, unless, indeed, he were prevented from suffering a non-suit by the fraud or other default of his adversary. (Oswald v. Tyler, 4 Rand 19; Tarpley v. Dobyns, 1 Wash. 185.) But when the party is defendant, he cannot at pleasure withdraw from the contest, as the plaintiff for the most part may, and therefore more indulgence is exhibited to him in affording him the relief of another trial in a proper case of accident or surprise. Hence, in case of the defence of *set-off* being resorted to, as the plaintiff by the statute (V. C. 1873, c. 168, § 9; *Ante*, p. 660), cannot thenceforward dismiss his suit without defendant's consent, he would stand on the same footing with the defendant in respect to a new trial on the ground of surprise.

If any insuperable obstacle should prevent an application to the court of law for a new trial for this cause, a court of equity may grant it, as already explained in connection with new trials for the discovery of new evidence. (*Ante*, p. 759.)

5*. Motion for a New Trial on the ground of *Misbehavior of the Jurors, or Gross Mistake as to their Duty*.

If the jury *disperse*, without leave of the court, after retiring to consider of their verdict, (Howle v. Dunn, 1 Leigh, 455); or if they *cast lots* to determine

what their verdict shall be; or if some yield their opinions because they are assured by others that a *majority is to prevail*, (Cochran v. Street, 1 Wash. 30); or if they agree that they shall respectively set down the amount each is in favor of, and divide by twelve, and that they will all *abide the result*, and adopt it as the conclusion of all; in any of these cases the verdict must be set aside, and a new trial granted. (Thompson's Case, 8 Grat. 637.)

But a *partial separation* of the jury, after their verdict is agreed upon, and *signed by the foreman*, does not vitiate it, (Ragland v. Wills, 6 Leigh, 1); nor is it vitiated by the fact that the amounts which the jurors respectively favored were added up and divided by twelve, if there was *no previous agreement to abide by the result*, but the jurors agreed to it after it was ascertained. (Thompson's Case, 8 Grat. 637.)

Proof, *by the jurors themselves*, of misbehavior, or of the motives which influenced the jury, or any of them, has been received always with the greatest caution, (Cochran v. Street, 1 Wash. 80); and the sentiment in opposition has grown progressively stronger, until in general it has come to be established doctrine that *jurors are inadmissible* for the purpose in question. Such is the apprehension of opening a door to tampering with them, that it is deemed more prudent, upon the whole, to permit even gross irregularities to pass unchallenged rather than to allow any inquiry to be propounded to the jurors touching the conduct of the jury, and especially touching the *motives and reasons* which influenced their judgment. (Thompson's Case, 8 Grat. 641, 650; Bull's Case, 14 Grat. 613, 626; Read's Case, 22 Grat. 947.) Thus where two jurors made oath that they agreed to the verdict *exclusively* upon the unsworn statement of one of their number privately in their chamber, the verdict was nevertheless permitted to stand. (Price's Ex'or v. Warren, 1 H. & M. 385.) And in another case, where *three* of the jurors declared that they were induced to assent to a verdict *for fear of being detained*, giving an amount of damages eight or nine times greater than they thought right, it was yet deemed no cause for a new trial. (Shobe v. Bell, 1 Rand. 39.)

See Harnsbarger v. Kinney, 6 Grat. 287; Moffett v. Bowman, 6 Grat. 219; Bull's Case, 14 Grat. 613, 632; Howard & als v. McCall, &c., 21 Grat. 212.

6^k. Motion for a New Trial on the ground of *Fraud or other Misconduct* of the successful Party.

If the successful party obtained the verdict by tampering with the jurors, or by tricking his adversary out of his evidence, &c., a new trial must be granted. (Terrell v. Dick, 1 Call. 546.)

7^k. Motion for a New Trial on the ground of *Misdirection, or other mistake of the court* in point of law.

In England, as is explained by Mr. Stephen, (St. Pl. 95; Id. (Tyler's Ed.) 125), the motion for a new trial is addressed, not to the *nisi prius* judge, who presides at the trial of the cause, but to the *court in bank* at Westminster, where the suit is instituted and the pleadings made up. The misdirection, or any mistake in point of law of the *nisi prius* judge, is therefore in that country a very common ground of application. But in Virginia, as the motion must be made to the same judge who is supposed to have committed the error, it is not a very frequent ground of application; and has been rather hastily and rashly declared to be with us, in consequence of the difference just adverted to in our judicial arrangement, no ground at all for a new trial. (Johnson v. Macon, 1 Wash. 322.) In subsequent cases, however, this suggestion is denied for the reason, that even the ablest judge may sometimes, during the haste of a trial, express an opinion which he himself would be glad of an opportunity, upon deliberate consideration, to correct; and it is held, that if the judge shall be of opinion that the party was prejudiced unjustly by the instruction, a new trial should be granted. (Guerrant v. Tinder, Gilm. 40; Gwatkin's Case, 9 Leigh, 678; Dowdy's Case, 9 Grat. 727; Montague's Case, 10 Grat. 773; Stevenson v. Wallace, 27 Grat. 77; Bull's Case, 14 Grat. 625-'6.)

The proper course, however, upon a supposed error by the court, is to file a *bill of exceptions* with a view to submit the case to an appellate court, in case the judge should adhere to his opinion. (Johnson v. Macon, 1 Wash. 322; Fleming v. Gilbert, 3 Johns. (N. Y.) 528; Dole v. Lyon, 10 Johns. 447.)

The various instances of such misdirection as constitutes ground for a new trial, are of course very numerous, being amongst many others the following: Where the court gives erroneous instructions, or instructs the jury as to the *effect of evidence*, (Berry v. Ensell, 2 Grat. 333; Taylor v. Burnside, 1 Grat. 165); or where it delivers any comment on the

weight of evidence, (McDowell v. Crawford, 11 Grat. 377); or *admits or excludes evidence improperly*, notwithstanding there is other testimony to the same facts before the jury. (Poindexter v. Davis, 6 Grat. 481.)

It is to be observed that for none of these several causes is a new trial to be granted by the court *ex mero motu*, but only upon the application of the party complaining of the verdict, (Humphreys' Adm'r v. West's Adm'r, 3 Rand. 518); nor whatever the irregularities of the former trial, if the result can be ascertained to conform to the substantial *legal justice of the case*. The motion, as we have seen, is addressed emphatically to the *discretion of the court*, and must never be granted unless to promote the *very right of the cause*. (Good v. Love's Adm'r, 4 Leigh, 635; Harnsbarger v. Kinney, 6 Grat. 288; Jas. Riv. & K. Co. v. Adams, 17 Grat. 435.)

In an action of *trespass*, where there are several defendants, some of whom are found guilty, and others are acquitted, although the plea was joint, yet, those found guilty may have a new trial without involving those who have been acquitted, who, unless the *plaintiff* can show cause for a new trial as to them, are finally discharged. (Guerrant v. Tinder, Gilm. 36; Boswell & al v. Jones, 1 Wash. 332.) And so, in cases of felony, if all are found guilty upon joint indictment and trial, the court may grant a new trial to one of them, and render judgment against the others. (Kemp's Case, 18 Grat. 964.)

2^d. The number of New Trials which may be Granted at Law.

The discretion of the *court of law* in *civil cases*, (unless where it is otherwise provided, as it is in the case of an issue out of chancery,) is not unlimited. "Not *more than two new trials*," says the statute, "shall be granted to the *same party* in the same cause." (V. C. 1873, c. 173, § 15.)

The statutory rule, it may be remarked, sometimes gives occasion for the interposition of a court of equity; for it is not to be supposed, if a third verdict shall be obtained fraudulently or by gross misconduct, that there is no remedy. In such a case the court of chancery enjoins the successful party from using his unjust advantage, and orders a new trial under its own direction. See Pickett v. Morris, 2 Wash. 175.

3^d. The Terms on which New Trials are Granted.

"The party to whom a new trial is granted," says

the statute, "shall, previous to such new trial, *pay the costs of the former trial*," unless the court enter that the new trial is granted for the misconduct of the opposite party, who in such case may be ordered to pay any costs which seem to the court reasonable. If the party who is to pay the costs of the former trial fail to pay the same at or before the next term after the new trial is granted, the court may, on the motion of the opposite party, set aside the order granting it, and proceed to judgment on the verdict, or award execution for said costs, as may seem to it best. (V. C. 1873, c. 181, § 5.)

2^d. Motion in *Arrest of Judgment*.

A motion in *arrest of judgment* is an application to the court on the part of a defendant, that judgment for the plaintiff be arrested or withheld, on the ground that there is some error *appearing on the face of the record* which vitiates the proceedings. In consequence of such error, in whatever part of the record it may arise, from the commencement of the suit to this period, the court is bound to arrest the judgment. It is, however, only with respect to objections *apparent on the record* that such motion can be made. Nor can it be made, generally speaking, except for mistakes of the most serious character. At common law it is otherwise, and judgments were formerly arrested for errors of mere form; but this abuse has been remedied, as well in England as with us, by certain statutes passed at different periods, to correct certain inconveniences of this kind, and commonly called the *statutes of amendment and jeofails*, by the effect of which, at present in Virginia, judgments cannot be arrested or reversed, except, as has been said, for the most serious objections. (St. Pl. 96 '7; Id. (Tyler), 126.)

The statutes of *jeofails* are so called from a French phrase, *j'ai faillé*, (I have made a mistake), or *jeofaille*, (I am mistaken), an expression used by the oral pleader of former days, when he perceived a slip in his proceedings. The series of such statutes began with 14 Edw. III, c. 6, and extends down to a comparatively recent period. (St. Pl. App'x, xxviii, note (32); Id. (Tyler) App'x, xxx, note (33).)

The whole doctrine, practically, of the *arrest of judgment*, is in modern times controlled by the statutes of *jeofails*, the provisions of which in Virginia are even more comprehensive than in England, and constitute indeed a kind of *panacea* for all kinds of defective and rickety pleadings.

The enactments on the subject, as they stand in our code, contemplate two prominent objects, viz :

(1), The *disregarding of certain errors* which do not affect the *essential merits* of the cause ; and,

(2), The *actual amendment* of certain other mistakes in the court where they occur, without the expensive and dilatory process of removal of the cause to a higher tribunal.

Let us consider each of these classes of provisions in order,

(1), Those provisions which direct certain errors which do not affect the *essential merits* of the cause to be *disregarded*.

"No judgment," says the statute, "shall be stayed, (that is, *arrested*), or *reversed*, (that is, by means of appellate process in a *higher court*,) for—

1, The *appearance of either party, being under the age of twenty-one years, by attorney*, if the verdict (where there is one), or the judgment be *for him, and not to his prejudice*; or

2, For *want of warrant of attorney*; or

3, For *want of a similiter*, or any *misjoining of issue*; or

4, For any *informality in the entry of the judgment* by the clerk; or

5, For the *omission of the name of any juror*; or because it may not appear that the verdict was rendered by the number of jurors required by law; or

6, For any *defect, imperfection, or omission in the pleadings*, which *could not be regarded on demurrer*, or for any other defect, imperfection, or omission, which might have been taken advantage of *on a demurrer*, but was *not so taken advantage of*. (V. C. 1873, c. 177, § 3.)

Prior to 1838, judgments for *default of defendant's appearance*, were not within the statute of *jeofails*, (as they are included in the statute above cited.) And, therefore, if any defect, however formal, appeared in them, they were liable to be reversed therefor, in an *appellate court*. Hence, as every judgment must be founded upon a sufficient writ of summons or arrest, the appellate court, according to the established doctrine, was obliged to examine the writ which instituted the suit, with the endorsements thereon, (notwithstanding the general principle that the writ, except to sustain the proceedings, is not considered a part of the record unless made such by *oyer*.) Judgments by *default of appearance* were pretermitted from the

earlier statutes of *jeofails*, and the writ was held in such cases to be part of the record, because it was apprehended that otherwise, the plaintiff would have it in his power to perpetrate a fraud upon the defendant, by issuing a writ for one demand, which the defendant, admitting it to be correct, would forbear to contest; and then filing his declaration and obtaining judgment by default of appearance for a much larger amount. (Hatcher v. Lewis, 4 Rand. 152; Nadenbousch v. Lane, 4 Rand. 413; Wainwright v. Harper, 3 Leigh, 270; Paine v. Britton, 6 Rand. 102.) Accordingly, it was always held, in that state of the law, that if the defendant *once appeared* (in which case he had an opportunity to inspect the writ,) although he afterwards suffered judgment to go against him by *nil dicit*, (which is also a judgment by default), yet the statute of *jeofails* applied to the case, and the writ is no part of the record. (Bargamin v. Poiteaux, 4 Leigh, 422-'3.)

Our statute of *jeofails* at present avoids the embarrassment alluded to by a general provision, that in *all cases of judgment by default*, (that is, not upon issue), the court wherein *the judgment was rendered, or the judge in vacation*, may, on motion, reverse the judgment for any cause for which before, an appellate court would have reversed it. (V. C. 1873, c. 177, § 5; Gunn v. Turner, 21 Grat. 384-'5.)

Let us next consider the *effect* of the statute of *jeofails*, as above set forth, in curing errors. The general principle is, that the statute cures a *defective statement* of a cause of action or defence, but not a statement or defence which makes *no case or title, or no defence at all*. (Langhlin v. Ford, 3 Munf. 273; Boyle's Adm'r v. Overby, 11 Grat. 202.) Hence, it has been held that if a declaration in debt on an assigned bond omit to allege non-payment to the *assignor* before notice of the assignment, the statute does not cure the omission, and judgment must *be arrested*. (Braxton's Adm'r v. Lipscomb, 2 Munf. 282; Buckner & ux v. Blair Ex'or, &c., 2 Munf. 336; Green v. Dulaney, 2 Munf. 520. See also Tompkins v. Branch Bank, 11 Leigh, 372; Mason v. Farmer's Bank, 11 Leigh, 90; Ross v. Milne & ux, 12 Leigh, 217, 227.) A good illustration of the non-application of the statute where *no case is made* by the pleadings, is afforded by Ross v. Milne & ux, 12 Leigh, 217. Milne and wife sued Ross upon an obligation whereby he had promised to pay Janet Smith, (who was his sister), £500 sterling for her daughter, now Mrs. Milne. Ross, defended the

case upon pleas of payment and of set-off, which he failed to maintain, and there was a verdict and judgment against him. He then, by writ of *supersedeas*, took the case into the court of appeals, and there the objection was for the first time made that the plaintiff's declaration set forth nothing but an *equitable demand*, and *no legal cause of action* whatsoever; an objection which the court of appeals sustained, and reversing the judgment, entered it for the defendant, Ross. The case would not be so ruled at present, because a subsequent statute has provided that if a covenant or promise be made for the *sole benefit* of a person with whom it is not made, or with whom it is made jointly with others, such person may maintain *in his own name* any action thereon, which he might maintain in case it had been made with him only; and the consideration had moved from him to the party making such covenant or promise. (V. C. 1873, c. 112, § 2.)

And as the statute of *jeofails* does not cure a statement which makes *no case or defence*, whilst it does cure merely *defective statements*, so upon similar principles it cures *mis-joinder or informal joinder* of issue, when it appears that the cause has been *tried upon its merits*, as though the issue had been formally joined. (Walden v. Payne, 2 Wash. 1; Moore v. Mauro, 4 Rand. 488; White v. Clay's Ex'or, 7 Leigh, 68; Southside R. R. Co. v. Daniel, 20 Grat. 361.) But not the *non-joinder or want of issue altogether*, (Stevens v. Taliaferro, 1 Wash. 155; Totty's Ex'or v. Donald, &c., 4 Munf. 430; Sydnor v. Burke, 4 Rand. 161; Lockridge v. Carlisle, 6 Rand. 21; McMillan v. Dobbins, 9 Leigh, 422;) except so far as the mere *want of a similiter goes*, for which an *express provision* is made that it shall be cured. (V. C. 1873, c. 177, § 3.)

Another case in which the statute was held not to cure error is Watson's Ex'or v. Lynch's Heirs, 4 Munf. 94. Watson's Ex'or instituted against *four* of Lynch's heirs an action on their ancestor's bond, and the sheriff having returned the writ executed on *three* of the defendants, and the fourth *no inhabitant*, the plaintiff filed his declaration against the *three*, without taking any notice of the *fourth*, or in anywise explaining the discrepancy between the writ and the declaration. The defendants craved oyer of the writ, and thus put it upon the record, and then pleaded "no assets by descent." The verdict and judgment being against them, they obtained a writ of *supersedeas* from the court of appeals, which reversed the judgment for the *variance*

between the writ and the declaration. This case, however, is not law at present, it having been enacted (by another statute than that of *jeofails*), that a variance between the writ and declaration shall be taken advantage of *only by a plea in abatement.* (V. C. 1873, c. 167, § 19.)

It must be observed, in connection with this subject of arresting and reversing judgments, that the statute declares a judgment *on confession* to be equal to a *release of errors.* (V. C. 1873, c. 177, § 2.) And the effect of this provision has been carried so far as to make a confession of judgment on a *forthcoming bond* a release of errors, not only in respect of the bond, but also in respect of the original judgment. (*McRae v. T. Pike Co.*, 3 Rand. 160; *Edmonds v. Green*, 1 Rand. 44; *Stanard v. Timberlake*, 3 Leigh, 681.)

And so an entry on the record that defendant relinquishes his plea, and says that he *cannot gainsay plaintiff's action*, is a confession of judgment, and therefore, under the statute, *is a release of all previous errors.* (*Richardson v. Jones*, 12 Grat. 53.)

(2), We are now to consider those provisions of the statute of *jeofails* which in certain cases allow an *amendment of mistakes* to be made in the court where they were committed, without resorting to an appellate tribunal.

The record during the sitting of the court is looked upon as *in fieri*, and in the breast of the court, and therefore subject to such modifications as it may think proper to direct. But upon the adjournment of the court, the record is considered as finally completed, and the policy of the common law rigorously prohibits any alteration therein after that time. This policy, founded upon an apprehension of the abuses to which the allowance of amendments might lead, was in the main wise, especially in a barbarous and unsettled age; but it was carried farther than the considerations which dictated it reasonably warranted, which Blackstone attributes to certain severities exercised upon Ralph de Hengham, the chief-justice, and certain other judges, by Edward I, for corruption and other malpractices, one being the *rasure of records.* (3 Bl. Com. 409.) Accordingly, various statutes have been from time to time enacted, cautiously enlarging the discretion of the courts, in respect to amendments of records. That discretion is still confined to errors which may be called *clerical*, and which there are, among the *papers in the cause*, the means *in writing* to correct, except indeed, in respect

to a release by a party of damages which he has erroneously recovered. Such a release is justly considered as made safe enough by the express assent, and indeed, *application* of the only person who could be injured by it. See *Sydnor v. Burke*, 4 Rand. 161.

Our present statute of *jeofails* declares in substance, that the court in which a judgment has been rendered, or the judge in vacation may amend it according to the truth and justice of the case, when there has been in the pleadings, or in the record of the judgment, any mistake, miscalculation, or mis-recital of any *name, quantity, sum, or time*, and the same is right in any part of the record or proceedings, or in short, where there is *any writing in the cause* whereby the judgment may be safely amended. Or, if a judgment is rendered on a *forthcoming bond* for a sum larger than by the warrant of distress or execution is proper, or on a *verdict for more damages than are laid in the declaration*, the excess may be released at a future term of the court, by an entry of *record*, or in vacation, by writing signed by the party obtaining the verdict, and attested *by the clerk*, and filed with the papers in the cause. (V. C. 1873, c. 177, § 5.)

All motions to amend under this statute must be *after reasonable notice* to the opposite party, and *within five years* from the date of the judgment. (V. C. 1873, c. 177, § 5.)

Errors thus amendable in the court where they are committed no longer constitute a ground upon which an appellate court can take cognizance of a cause, to revise the decision thereof, until a motion to amend has been made in the court below, and overruled in whole or in part. And when an appellate court hears a cause, and it appears that either before or since it took cognizance of it, the judgment has been amended in the lower court, the appellate court is to affirm the judgment; and if it appear that the error ought to be, but has not been amended, the appellate court is to make the amendment, and still affirm the judgment, always supposing that there is no other error. (V. C. 1873, c. 177, § 6; *Lewis v. Arnold*, 13 Grat. 454; *Gunn v. Turner*, 21 Grat. 384-'5.)

The practical question, what are the *clerical errors* which may thus be amended in the same court where they occur is sometimes rather embarrassing. It is clear that the provision was intended to apply exclusively to those inadvertencies *of the clerk* which depend upon a comparison and calculation to be made by him,

and which may be safely reformed by reference to other statements in writing contained in the proceedings, and not at all to *judicial errors* growing out of a mistaken application of the law to the facts, notwithstanding such mistaken application be made by the clerk alone, and the court be not directly privy to it; for the clerk acts as the subordinate, and frequently as the assessor of the judge, in cases uncontested. The difficulty lies in discriminating, in many cases, between these two classes of mistakes. For instance, in *Bent v. Patten*, 1 Rand. 34, the defendant had confessed a judgment on a bond dated June, 1796, "*with interest from June 1796*," and the clerk, in entering judgment, in pursuance of the confession, had allowed interest after the rate of *six per cent.* per annum, whereas in June, 1796, the rate was only *five per cent.* It was changed to six per cent. in *November*, 1796. (1 Statutes at Large (N. S.) 27.)

This was held to be *not a clerical*, but a *judicial error*, it being a question of law what interest was allowable under the circumstances. Again, in *Compton v. Cline*, 5 Grat. 137, an action of debt was brought on a bond for \$188, which was described in the declaration as for \$108; and the defendant confessed judgment for "*the debt in the declaration mentioned*," and judgment was entered by the clerk for \$108. This was held—if it was an error at all, as to which the court forbore to express an opinion—to be *not a clerical*, but a *judicial error*; the result of a mistaken application of the law to the facts; and, therefore, not amendable at a subsequent term of the same court.

On the other hand, where, in a judgment by default, the clerk allowed interest from a date posterior to that from which, by the terms of the bond, interest was to run, it was deemed a mere *clerical mistake*, which might be safely corrected by the body of the bond. (*Commonwealth v. Winstons*, 5 Rand. 546.)

See also *Eubank v. Ralls*, 4 Leigh, 308; *Shelton's Ex. v. Welch's Adm'r.* 7 Leigh, 175; *Powell's Case*, 11 Grat. 822; *Richardson v. Jones* 12 Grat. 53.

3^h. Motion for Judgment *Non obstante Verdicto*.

A motion for a judgment *non obstante verdicto*, that is, that judgment be given in the mover's favor, *without regard to the verdict* obtained by his adversary, is made in cases where, after a pleading by the adversary in *confession and avoidance*, and issue joined thereon, and verdict for the adversary, the unsuccessful party, on retrospective examination of the record, conceives

that such pleading was *bad in substance*, and might have been made the subject of demurrer on that ground. If the pleading was *substantially bad in law*, of course the verdict, which merely shows it to be true in *point of fact*, cannot avail to entitle the party so pleading to judgment; while on the other hand, the pleading being in *confession and avoidance*, involves a confession of the opposite party's allegations, to which it undertakes to respond, and shows that he was entitled to whatever judgment that averment then admitted to be true, gave him a claim. In such a case, therefore, the court will give judgment for such opposite party, *without regard to the verdict*; and this, for the reason above explained, is also called judgment *as upon confession*. It may be sometimes expedient, it is said, for the party who has *obtained the verdict*, himself to move for judgment *non obstante, &c.*; for a judgment *upon a verdict*, in such a case as above described, would be erroneous, although it is not easy to conceive of a case which would illustrate or exemplify this last observation. The cases which are cited by Mr. Stephen for that purpose, (*Wilkes v. Broadbent*, 1 Wils. 63; and *Dighton v. Bartholomew*, 2 Cro. (Eliz.) 778) certainly throw no light upon the point. By way of illustration, however, of the general subject of judgment *non obstante, &c.*; the first of those cases may be stated: *Broadbent* brought an action of trespass against *Wilkes* for breaking and entering his close, to which defendant pleaded by way of confession and avoidance, a *custom of the manor* which allowed it. Plaintiff traversed the custom, and the issue being joined thereon, the verdict was for the defendant *upon the custom*. Plaintiff then demanded judgment *non obstante, &c.* upon the ground that the custom was illegal and void, being uncertain and unreasonable; and the court agreeing that the custom was illegal and void gave judgment accordingly, *without regard to the verdict* for the plaintiff; the defendant having by his plea *confessed the plaintiff's action*, and sought to avoid it by matter which in law had no effect toward discharging him. (St. Pl. 97-'8; *Id* (Tyler's) 126-'7.)

The nature of a judgment *non obstante, &c.* may be further illustrated by the case of *Chew v. Moffett*, 6 Munf. 122, which was an action of *debt on a bond*, to which defendant pleaded *fraud in the consideration*; a defence not at that time available against a sealed instrument in a court of law, although since allowed by statute, by means of a plea in the nature of a plea of

set-off. The plaintiff traversed the plea, and upon the issue joined thereon the jury found *for the defendant*. The plaintiff then moved for a judgment *non obstante, &c.*, upon the ground that the plea confessed the plaintiff's action, and that the same was not *in law* avoided by the fraud. The court, however, held that although the defence was not available in the first instance *in a court of law*, yet the plaintiff must be understood as waiving the objection when he traversed the plea, and the motion for a judgment *non obstante, &c.*, was therefore overruled.

By the English practice the motion for a judgment *non obstante, &c.*, is employed in behalf of the *plaintiff alone*, and never for the defendant. The proper motion for defendant in a corresponding case, in England, is *in arrest of judgment*, (St. Pl. 97; Id. (Tyler) 126; Rand. v. Vaughan, 1 Bing. N. C. (27 E. C. L.) 767.) With us no difference is made between the parties, but a motion for a judgment *non obstante, &c.*, is as readily entertained for the defendant as for the plaintiff. The diversity is unsubstantial, but the English practice is a little more nicely discriminative than ours; for a judgment *for the defendant*, without regard to the verdict, is in fact an *arrest of judgment*. The cases in Virginia, of judgment *non obstante, &c.*, *for defendant*, or of approval of such judgments are numerous, *e. g.* Brown v. Shields, 6 Leigh, 440; Mason v. Farmers Bank, 12 Leigh, 84; Ross v. Milne & ux, 12 Leigh, 227; Tompkins v. Branch, &c., 11 Leigh, 372; Boyle's Adm'r v. Overby, 11 Grat. 206.

It will be observed, in conclusion, that the judgment *non obstante, &c.*, is *upon the merits*, not indeed, as disclosed *in the verdict*, which does not disclose them, but as exhibited *in the pleadings*. There is, therefore, no occasion to set the verdict aside, still less to set aside the pleadings. The judgment is to be entered, not upon the verdict, but upon the *pleading in question*, which confesses the adversary's averment, without successfully avoiding it. (Wilkes v. Broadbent, 1 Wils. 63.)

4^b. Motion for a *Repleader*.

A motion *for a repleader* is appropriate where the unsuccessful party, on examination of the pleadings, conceives that the issue joined and decided was on an *immaterial point*, not proper to determine the action. It may happen to either party, plaintiff or defendant, from misapprehension of the law, or from oversight, to pass over without demurrer a statement on the other side, insufficient and immaterial in law; and an issue of

fact may have been ultimately joined on such immaterial statement; and so the issue will be immaterial, although the parties have made it the point of controversy between them. For example, in an action of trespass on the case in assumpsit, against an administratrix, upon a promise *by decedent*, defendant pleaded that *she* did not assume, on which issue was joined, and verdict for defendant. A repleader was awarded on motion of the plaintiff, because it was immaterial to the merits of the action whether *she*, the defendant, assumed or not. The proper question, and, therefore, the proper issue was, whether the *deceased* promised. (Bac. Abr. Pleas. (m) 2; St. Pl. 99; Id. (Tyler) 127; Fairfax v. Lewis, 2 Rand. 43.)

Again, in an action on a bond, *binding the heirs*, against a party *as heir*, and also as *devisee* of the obligor, the plea was, "no assets *by descent*;" on which issue was joined, and a verdict given thereon for defendant. The issue was deemed immaterial, because it left the plaintiff's claim against the defendant as *devisee*, still unmat-tered, and a repleader was awarded. (Baird & Co. v. Mattox; 1 Call, 266.) And in this case it was held, upon irresistible considerations of common sense, notwithstanding some imposing *dicta* to the contrary, that where a repleader is proper, it is the *duty* of the court *ex-officio* to award it, without any motion from either side; for how can the court pronounce any judgment at all upon a verdict which ascertains indeed, a fact upon which the parties have improvidently staked their cause, but which the court perceives to be entirely irrelevant and immaterial? Accordingly, this doctrine (that the court must, *ex-officio*, award a repleader where one is required), holds even in an *appellate court*, which can no more give an intelligent judgment, when the only facts ascertained are immaterial, than a court of original jurisdiction. See Burnett v. Holbech, 3 Saund, 319 a; Bac. Abr. Pleas. (M.) 3; Kirtley v. Deck, 3 H. & M. 392; Callis v. Waddy, 2 Munf. 512; Day v. Pickett, 4 Munf. 108; Tomlinson v. Mason, 6 Rand. 171, 172.

A further illustration of the application of a repleader is the case of a *writ of right*, where the boundaries of the land claimed are not set out in the pleadings, and there is nothing in the record to define them. (Bolling v. Mayor of Petersburg, 3 Rand. 585; Dudley v. Estelle, 6 Leigh, 5627.) The same principle applies also, in the case of an action of ejectment, where the description in the pleadings is too vague, and there is nothing in the record to make it more definite;

as where the declaration describes the land as part of a larger tract owned by plaintiff, near certain creeks which have no notoriety, and upon the general issue the jury find for the plaintiff the land *in the declaration mentioned* (Hitchcox v. Rawson, 14 Grat 526.) And although in this case a *venire de novo* was awarded, it was yet apparently a proper case for a repleader; and indeed, as the *venire de novo* only set the *verdict* aside, it was still necessary to *correct the pleadings*, so that something equivalent to a repleader, it would seem, must have taken place afterwards.

It is said to be a rule upon this subject, that the court will never award a repleader in favor of him who has committed the first fault in pleading. (2 Tidd's Pract. 921; 3 Saund 319, & n (6); Kirtley v. Deck, 3 H. & M. 392; Day v. Pickett, 4 Munf. 108.) Doubtless, if the pleaders only were to be considered, it might be proper to punish their remissness in this way. But whilst the court is visiting upon the parties the *laches* of their counsel, what is it to do in respect to *its own judgment*? Is the judge to stultify himself by pronouncing a judgment upon grounds irrelevant and immaterial? It may be observed, in respect to the case of Kirtley v. Deck, above cited, in which the doctrine was propounded that there was no occasion for it, the judgment rendered being proper on another ground. In that case Deck having instituted an action for slander against Kirtley, the latter pleaded simply the word "*justification*," to which the plaintiff replied generally, and issue was joined thereon, and a verdict was rendered for the plaintiff. Kirtley then wanted a repleader upon the ground of the indefiniteness of his own plea of "*justification*," which made, he said, an "*immaterial issue*." The court refused to award a repleader, because Kirtley, who moved for it, made the first mistake by his indefinite plea; but it was no fit case for a repleader at any rate; for although the plea was indefinite and technically bad *on demurrer*, it was not insensible, and in fact presented to the jury an issue perfectly well understood by them, and by the parties, and both relevant and material. See Gould's Pl. 509, &c.

The essential differences between a motion for a judgment *non obstante veredicto* and for a repleader, are these:

(1), That the motion for a repleader lies alike at the instance of either party, plaintiff or defendant; whilst the motion for a judgment *non obstante veredicto*, ac-

cording to the English, and as it seems the better practice, lies for the plaintiff alone, (*ante*, p. 772,) upon a pleading by way of *confession and avoidance*.

(2), That a *repleader* is upon the *form and manner of pleading*, so that the court knows not for whom to give judgment, and therefore obliges the parties to plead over again; whilst a judgment *non obstante veredicto* is always *upon the merits*, when it is apparent, upon the pleader's own showing (upon his pleading in confession and avoidance) that he has no adequate answer to make to his adversary's averments. See 2 Saund. 319 e, n (c).

5^b. Motion for a Writ of *Venire Facias de Novo*.

A writ of *venire facias*, it will be remembered, is a writ by which a jury is summoned to try an issue, and therefore a writ of *venire facias de novo* is merely a new writ to *summon a new jury*. It is awarded when, by reason of some irregularity or defect in the proceedings on the first *venire*, or at the trial, the proper effect of that writ has been frustrated, or the verdict has become void in law; as for example, when the jury has been improperly chosen, or has given an uncertain or ambiguous or defective verdict. The consequence and object of a new *venire* are of course to obtain a new trial; but the student must not confound the motion for a *venire de novo* with the motion for a new trial. The most essential difference between them is that the *venire de novo* is never granted except for causes *appearing on the record*, whilst a new trial is obtained for *extrinsic reasons*, not appearing on the record. Another important diversity is that the *venire de novo* is an ancient process of the common law, and the propriety of granting it is to be determined upon principles of law, allowing no *discretion* to the court; a new trial, on the other hand, is comparatively a modern practice, (a substitute for the old writ of *attaint*,) whereby, as we have seen, the *equitable discretion* and interposition of the court is invoked in order to prevent the verdict from occasioning a *palpable injustice*, and is emphatically subject to the discretion of the court. (2 Tidd's Pract. 922; *Witham v. Earl of Derby*, 1 Wils. 55; *Kinney v. Beverly*, 2 H. & M. 318.)

A *venire de novo* can occur with us only in these three cases, namely:

(1), Where it appears from the record that the jury has been improperly selected or returned, or that a challenge has been improperly disallowed, (2 Tidd's Pr. 922; V. C. 1873, c. 158, § 19 to 21; *Parsons v.*

Harper, 16 Grat. 79); supposing the objection to have been made before the jury was sworn, or that the party applying for relief was injured by the irregularity;

(2), Where the verdict is upon its face *so imperfect* that the merits of the cause are not disclosed, and so no judgment can be given upon it.

Thus, where a statute imposes a penalty for selling wine by certain retail measures, as quart, gallon, &c., and in a prosecution under it the jury find that the defendant sold wine *by bottles*, without ascertaining the capacity of the bottles, the verdict was held to be so *imperfect* as not to warrant a judgment, and that a *venire de novo* must be awarded. (Witham v. Earl of Derby, 1 Wils. 56; Brown, &c. v. Ferguson, 4 Leigh, 37.)

(3), Where it appears that the jury ought to have found *other facts differently*.

Thus in an action of *trover*, if the jury find that the goods were demanded of the defendant by the plaintiff, and defendant refused to deliver them, a *venire de novo* ought to go, because the jury have found only the *evidence* of a fact which they ought to have determined, for demand and refusal are only *evidence* of a conversion, and they ought to have found a *conversion*. (Witham v. Earl of Derby, 1 Wils. 56.)

Another example of this third case is afforded where upon a plea of *plene administravit*, in an action against a personal representative, the verdict finds that defendant has assets of the estate unadministered in his hands, but omits to find the amount. Here there must be a *venire de novo*, because the verdict ought to have found that *other fact* of the amount of assets. (Roger's Adm'r v. Chandler's Adm'x, 3 Munf. 65; Eppe's Adm'r v. Smith's Adm'r, 4 Munf. 467; Gardner's Adm'r v. Vidal, 6 Rand, 106; *Ante*, p. 737.

From what has been said, it is obvious that a *venire de novo* will in practice most frequently originate from a *special verdict*; for a general verdict is so short and comprehensive (being generally, simply "*for the plaintiff* such a sum," or "*for the defendant*,") as scarcely to leave room either for imperfectness or insufficiency. Yet a case may occur where, although the verdict is general, yet there must be a *venire de novo*. Thus, where there are *two or more issues of fact*, and the verdict responds to *but one*, or to *less than all*, (Hite's Heirs v. Wilson, 2 H. & M. 268); or where, on the plea of *plene administravit*, as above explained, the verdict fails to determine the *amount of assets* in the hands of

the executor, &c. (*Goosely v. Holmes' Adm'r*, 3 Call. 424), a *venire facias de novo* is to be awarded.

We find it said by writers of the highest authority, that judgment is sometimes *arrested*, when the pleadings are good, for faults *in the verdict*; as where the verdict varies *substantially* from the issue, or finds only *part* of the matter in issue, omitting to find either way some other *material fact*. (Bac. Abr. Verdict (M) and (O); Gould's Pl. c. x, § 55 & seq.) But the student should understand that these writers do not mean a technical *arrest of judgment*, but merely that the court should *forbear to give judgment*; for they themselves say expressly that for all such defects in the *verdict*, a *venire de novo* must be awarded. (Bac. Abr. Verdict, (M); Gould's Pl. 526, c. x, § 63. See St. Pl. Amer. App'x cxxviii, n (7), and p. cxxxix, same note.)

SECTION IV.

4^b. Judgment.

It has now been shown in what manner the issue, whether of law or fact, is decided. It has been explained too, by what means the unsuccessful party upon an *issue in fact* may avoid in some cases, by motion in court, *the effect* of the decision. Supposing, however, that such means are not adopted, or do not succeed, or that the *issue be an issue in law*, the next step is *the judgment*.

As the issue is the question which the parties themselves have, by their pleadings, mutually selected for decision, they are in general considered as having *mutually put the fate of of the cause upon that question*; and as soon, therefore, as the issue is decided in favor of one of them, that party in general becomes victor in the suit, and nothing remains but to award the judicial consequences which the law attaches to such success. The award of this judicial consequence is called *the judgment*, and is the province of the court. (St. Pl. 103-'4; Id. (Tyler's Ed.) 132-'3.)

Let us take notice of, (1), The nature of the judgment; (2), The amount of the judgment; and (3), The doctrine touching the costs of the suit;

W. C.

1^c. The Nature of the Judgment.

The nature of the judgment varies according to the nature of the action, the plea, the issue, and the manner and result of the decision. The most prominent difference is, whether the issue is decided for the *plaintiff* or *defendant*. Another prominent diversity is, whether the cause is decided *upon an issue*, or *without an issue*. And when the issue is decided for the *plaintiff*, one important difference is between

an issue *in law*, arising upon a *dilatory plea*, when the judgment is only *respondeat ouster*, that defendant answer over; and *all other issues*, whether of law or fact, when the judgment is *quod recuperet*,—that the plaintiff recover. Another important difference is between judgments interlocutory and judgments *final*. (St. Pl. 104-'5; Id. (Tyler's Ed.) 133 & seq.)

We are to observe here, the nature of the judgment: (1), When the cause comes to issue; and (2), When it comes not to issue;

W. C.

1^d. Nature of the Judgment when the Cause *comes to Issue*.

Let us suppose (1), That the issue is decided for the plaintiff; and (2), That it is decided for the defendant;

W. C.

1^o. Nature of the Judgment when the Issue is decided *for the Plaintiff*.

The issue thus determined for the plaintiff may be, (1), An issue in law; and (2), An issue in fact;

W. C.

1^f. Nature of the Judgment for the Plaintiff, *upon an issue in Law*.

The issue in law arises always *on demurrer*, and may be upon a demurrer, (1), To a dilatory plea; and (2), To a peremptory plea, &c.;

W. C.

1^s. Nature of a Judgment for the Plaintiff, *upon an Issue in Law on a Dilatory Plea*.

The judgment for the plaintiff upon an issue in law on a *dilatory plea*, is always *respondeat ouster*, that defendant answer over. The pleading is accordingly resumed, and the action proceeds. The judgment, therefore, does not fall within the terms just above given, but is of an anomalous kind. (St. Pl. 104-'5; Id. (Tyler) 133.)

2^s. Nature of the Judgment for the Plaintiff *upon an Issue in Law on a Peremptory Plea, &c.*

The judgment for the plaintiff upon an issue in law upon a peremptory plea, or upon any pleading other than a dilatory plea, is that the *plaintiff do recover*, which is called a judgment *quod recuperet*. And as this is also the judgment for the plaintiff upon all *issues in fact* whatsoever, the student must note here the distinction between *interlocutory* and *final* judgments, which will be explained presently. (St. Pl. 105; Id. (Tyler) 133.)

2^f. Nature of the Judgment for the Plaintiff *upon an Issue in Fact*.

The judgment for the plaintiff on an issue in fact, is

always that the *plaintiff do recover, quod recuperet*, as it is called. And the judgment is either *interlocutory* or *final*. (St. Pl. 105-'6; Id. (Tyler) 133-'4.)

When the liability of the defendant is ascertained *prima facie*, and the amount for which he is responsible is also ascertained *prima facie*, as for example, by a writing signed by him, the judgment is *final*; whilst in all other cases it is *interlocutory* only, in the first instance, and there must, in general, be what is called a *writ of inquiry*, (or with us, an *order of inquiry*,) in order to ascertain the defendant's definite liability, and the amount for which he is answerable. The doctrine touching a writ of inquiry, and the cases wherein it is required, have been explained. *Ante*, p. 601-'2.

Whenever then, the *liability* of the defendant, and the *amount* for which judgment is to be given, are not *prima facie* apparent, if the issue be an issue *in law*, or any issue *in fact not tried by a jury*, the judgment is *quod recuperet*, that the *plaintiff ought to recover his damages* without specifying their amount, and resort must be had to the expedient of a *writ of inquiry* to ascertain it. This judgment is styled *interlocutory*. Upon the execution of the writ of inquiry whereby *the amount is determined*, *final judgment* is rendered, *that the plaintiff do recover of the defendant the damages assessed*; but if the issue be tried by a *jury*, then the jury, at the same time that they try the issue, assess the damages; so that, in this case, no writ of inquiry is awarded, but the judgment is *final* in the first instance. (St. Pl. 106.)

2°. Nature of the Judgment, when the Issue is decided for the Defendant; W. C.

1°. Nature of the Judgment for the Defendant, where the Issue, (whether of fact or law), is on a Dilatory Plea.

Where the dilatory plea is *to the jurisdiction of the court*, the judgment is *that the court will not take further cognizance of the plea aforesaid of the said plaintiff*; where it is in *suspension of the action*, the judgment is *that the suit do stay and be respited until, &c.*; and where in *abatement*, that the writ (or declaration) be *quashed*. The effect in the first and third cases is that the suit is defeated, but with liberty to the plaintiff to begin another in the proper jurisdiction, and in more correct form, (the defendant being required by his plea to furnish correct materials therefor, that is, to give the plaintiff a better writ;) and in the second case, the effect is that the suit is *suspended* until the objection be removed. (St. Pl. 106, 107; Id. (Tyler,) 134-'5.)

2°. Nature of the Judgment for the Defendant, where the

Issue, (whether of law or fact), arises upon a *Declaration*, or *Peremptory Plea*, or a *Pleading following thereon*.

The judgment is in this case, in general, *that the plaintiff take nothing by his writ, and that the defendant go thereof without day, &c.*, which is called a judgment by *nil capiat*.

2^d. Nature of the Judgment when the Cause comes not to Issue.

Hitherto, judgment has been supposed to be awarded only upon the *decision of an issue*. There are several cases, however, in which judgment may be given, as we have had occasion to see, though no issue has arisen, and these cases now require notice. (St. Pl. 107; Id. (Tyler,) 135.)

W. C.

1^o. Judgment against the Defendant where the Cause comes not to Issue.

It will be proper to mention, (1), The circumstances under which such judgment against the defendant occurs; and (2), The terms of such judgment;

W. C.

1^t. The Circumstances under which such Judgment against the Defendant occurs.

Judgment against the defendant where the cause comes not to issue may occur, (1), For default of appearance; (2), By *nil dicit*; (3), By *non sum informatus*; and (4), By confession;

1^s. Judgment against the Defendant for *Default of Appearance*.

We have already seen somewhat of the nature of this judgment; that it occurs when defendant, having been duly summoned, fails to appear, whereby there goes against him, in the clerk's office, a judgment called an *office judgment*, with or without a writ of inquiry, as the circumstances may demand, which is liable to become final if it is not set aside before the end, or before the fifteenth day of the next term, (whichever may first happen), by an *issuable plea*. *Ante*, p. 600.

2^s. Judgment against the Defendant by *Nil Dicit*.

This also, is a judgment *by default*, and takes place where defendant has *once appeared*, but has omitted to say anything in his defence, or at a subsequent stage of the proceeding has failed to respond to the plaintiff's adverse averments. Thus, to an action on a bond, defendant pleads a release; plaintiff replies denying the release, and defendant *says nothing* to such denial. The judgment in such case is by *nil dicit*. See Form of Rule Book, *Ante*, p. 600, last case but two.

3^s. Judgment against the Defendant by *Non sum informatus*.

This judgment occurs when defendant's counsel, upon entering his appearance, says that *he is not informed* of anything material to say in defence of his client, whereby he, of course, leaves him undefended; so that this is a third kind of *judgment by default*. It is not of frequent occurrence, for it can seldom happen that a defendant will find it worth his while to employ counsel merely to say that he *has no defence*.

4^s. Judgment against the Defendant *by Confession*.

Judgment by confession is where the defendant acknowledges the plaintiff's action for the debt or damages claimed, or for so much as is agreed on by the parties. It may be before plea or afterwards; and in the latter case, the defendant is said to *relinquish his former plea*, and to acknowledge the action. It may also be by attorney as well as in person; nor need the attorney be a lawyer; and the power to confess the judgment may be executed as well before as after the action is brought. (Ins. Co. v. Barley, 16 Grat. 382 & seq, 384 & seq; Calwell v. Shields, 2 Rob. 305; 1 Rob. Pr. (2nd ed.) 268.) For the doctrine touching confession of judgments, see *Ante*, p. 604.)

2^o. The Terms of the Judgment *against the Defendant*, when the *Cause comes not to Issue*.

The judgment against the defendant in any of the cases named where the cause comes not to issue, is that the plaintiff do recover, &c., or *quod recuperet*, which is *interlocutory* or *final*, according as a writ of inquiry is, or is not required, upon the principles already explained. *Ante*, p. 602.

2^o. Judgment *against the Plaintiff*, where the *Cause comes not to Issue*.

Let us observe, (1), The circumstances under which such judgment against the plaintiff occurs; and (2), The terms of such judgment;

W. C.

1^t. Circumstances under which such Judgment *against the Plaintiff* occurs.

The circumstances under which such judgment against a plaintiff occurs are, (1), By *non prosequitur*; (2), By *nolle prosequi*; (3), By non-suit; and (4), By *retrahit*;

W. C.

1^s. Judgment by *Non prosequitur* against the Plaintiff.

This judgment takes place where the plaintiff, at any stage of the action after appearance, and before judgment, abandons and fails to prosecute his action, as by not filing his pleadings in due succession, &c. In such case the entry is that, having been ruled to file his de-

claration, (or other pleading), and failing so to do, it is ordered that he be non-suited, and pay, &c. (Rob. Forms, 59.)

2^d. Judgment by *Nolle prosequi* against Plaintiff.

This judgment occurs where the plaintiff, not merely fails to prosecute his action, but expressly declares, and it is so entered of record, *that he will not further prosecute his suit*. The *nolle prosequi*, like the *non prosequitur*, may occur at *any stage* of the action after the appearance, and before the judgment. (St. Pl. 109; Id. (Tyler), 136.)

3^d. Judgment against Plaintiff by *Non-suit*.

Judgment by *non-suit* against the plaintiff happens where, on trial by jury, the plaintiff is called or demanded, at the instance of the defendant, to be present in court while the jury give their verdict, in order to answer the amercement, to which by the old law he was liable in case he failed in his suit, and fails to make his appearance. In this case no verdict is given; but judgment of non-suit passes against the plaintiff. (St. Pl. 109; Id. (Tyler), 136; Tidd's Pract. 867.)

In Virginia, we employ the word *non-suit* to express any failure on the part of the plaintiff to prosecute his suit, whether upon being called at the trial or any other time; so that it includes, not only the idea of a *non-suit* proper, but also of a *non prosequitur*, and of a *nolle prosequi*, (*non-pros* and *nol-pros*, as they are respectively called.)

The effect of the *non-suit* in this comprehensive sense is to put an end to the pending suit, without precluding another for the same cause of action; being in that particular unlike *retraxit*, which is not only an abandonment of the existing suit, but a declaration of record that the plaintiff had *no cause of action*; so that it is as conclusive as a verdict. The non-suit is resorted to in our practice when the plaintiff finds himself unprepared with evidence to maintain his cause, either in consequence of his being ruled into a trial when he is not ready, or for any other reason.

In England, and in some of these States, it is a frequent practice for the courts to *direct the plaintiff to suffer a non-suit* whenever they think the evidence *palpably insufficient* to maintain the action, and that without consulting the wishes of the plaintiff. In Virginia no such practice has ever prevailed. Although the courts may advise a *non-suit*, they cannot coerce it. The plaintiff may appear when he is called, and his appearance must be recorded, which puts a *non-suit* quite out of the

question. (Ross v. Gill, 1 Wash. 89; Thwest v. Finch, 1 Wash. 219.)

By our statute a *non-suit* (that is, any voluntary abandonment of the cause,) must be suffered, if at all, *before the jury retire from the bar*, (V. C. 1873, c. 173, § 10); and whenever and however suffered, that is, in all cases of dismissions or discontinuances produced by the plaintiff's voluntary abandonment of his cause, judgment is given for the defendant against the plaintiff *for five dollars damages*, besides his (the defendant's) costs. (V. C. 1873, c. 167, § 5; Pinner v. Edwards, 6 Rand. 676 & seq.)

We have seen that where the defendant has filed a plea or account of set-off, whether general or special, the plaintiff is not allowed to dismiss his case without the defendant's consent. (V. C. 1873, c. 158, § 9.)

4th. Judgment by *Retraxit*.

This judgment occurs where the plaintiff *withdraws his suit*, thereby acknowledging that he *had no cause of action*. Such a judgment precludes any renewal of the action as effectually as a verdict. And therefore it has not been deemed needful to impose the same penalty, (\$5,) as in case of *non-suit*, which allows the action to be recommenced. (Pinner v. Edwards, 6 Rand. 677.) A *retraxit* can only be entered by the plaintiff *in person*, and *in open court*. (Muse v. Farmers Bank, 27 Grat. 257.)

2^d. The Terms of the Judgment against the Plaintiff, when the Cause *Comes not to Issue*; W. C.

1st. The Terms of the Judgment against the Plaintiff in Case of *Non-pros.*, *Nol-pros.*, and *Non-suit*.

The judgment is *nil capiat*, (that plaintiff *take nothing* by his writ, &c.) and also with us in Virginia *five dollars* damages in favor of the defendant, besides the latter's costs. (V. C. 1873, c. 167, § 5.)

2nd. Terms of the Judgment against the Plaintiff, in Case of *Retraxit*.

The judgment is *nil capiat* (that plaintiff *take nothing* by his writ, &c.)

In all judgments for the *plaintiff* there is an addition that the defendant "*be in mercy*," (in *miserericordia*.) that is, be *amerced* or fined, at the *mercy of the court*, for his delay of justice; whilst in judgments for the *defendant* the corresponding clause is that the plaintiff "*be in mercy*" for his *false clamor*, or claim. (St. Pl. 110; Id. (Tyler's Ed.) 137.)

Judgments, like the pleadings, were formerly pronounced in *open court*, and are still always *supposed* to be so; and they are consequently considered as always

taking place in *term-time*, save only under a statute in Virginia, (V. C. 1873, c. 167, § 42,) where a judgment is confessed in the *clerk's office* in vacation, in which case it is as final and valid as if entered in court on that day, subject, however, to be corrected by the court *at the next term*. But by a relaxation of practice of long standing, there is now, for the most part, except in the case of an issue *in law*, no actual and *audible* delivery of judgment, either in court or elsewhere. There is, with us, at the proper time, in the clerk's office *at rules*, a brief note of the judgment made, whence, if need be, a full record may be prepared, and whenever a cause is ready for judgment during the *sitting of the court*, a judgment is regularly entered at large upon the minutes of the court. But those office judgments which become final by law in consequence of not being set aside at the ensuing term, (V. C. 1873, c. 167, § 45,) are not entered at large any where. The only record of them is the brief note in the rule-book, as above described.

In England, it is customary for the plaintiff or defendant, when the cause is in such a state that, by the course of practice, the party is entitled to judgment to obtain the signature or allowance of the proper officer of the court, expressing generally, that judgment is given in his favor, and this is called *signing judgment*, and stands in the place of its actual delivery by the judges themselves. And though supposed to be pronounced during term, judgments are frequently *signed in vacation*. (St. Pl. 110-11; Id. (Tyler's Ed.) 37-8; 2 Tidd's Pract. 930.)

Forms of *entry of judgment* for several cases are given by Mr. Stephen, (St. Pl. 112 & seq; Id. (Tyler's Ed.) 139 &c.) and corresponding entries as they would occur in our practice are subjoined.

ENTRY OF JUDGMENT FOR DEFENDANT UPON DEMURRER TO DECLARATION.

Ante, p. 618 & seq.

This day came the parties, by their attorneys, and thereupon the matters of law arising upon the defendant's demurrer to the plaintiff's declaration being argued, it seems to the court that the said declaration, and the matters therein contained, are not sufficient in law for the plaintiff to have and maintain his action against the said defendant; therefore, it is considered by the court that the plaintiff *take nothing by his bill*, but for his false clamor, be in mercy, &c., and that the defendant go thereof without day, and recover against the plaintiff his costs by him about his defence in this behalf expended. (Rob. Forms, 98.)

ENTRY OF JUDGMENT FOR PLAINTIFF UPON AN ISSUE IN FACT.

This day came the parties, by their attorneys, and thereupon came a jury to wit: A. B. (and eleven others), who, being duly elected, tried and sworn the truth to

speak upon the issue joined, upon their oath do say that the said plaintiff was, at the time of the making of the said deed of release in the defendant's plea mentioned, unlawfully imprisoned and detained in prison by the said defendant, until by force and duress of that imprisonment, he, the said plaintiff, made the said deed of release, in manner and form as the said plaintiff hath in his replication to the said plea alleged. And they assess the damages of the said plaintiff, by reason of the breach of covenant in his declaration assigned, at \$ —, with lawful interest thereon, from the — day of — in the year of our Lord eighteen hundred and seventy —, until paid. Therefore, it is considered by the court, that the plaintiff recover against the defendant his damages assessed as aforesaid, with interest thereon, to be computed after the rate of six *per centum per annum*, from the — day of — in the year of our Lord eighteen hundred and seventy —, until paid, and his costs by him about his suit in this behalf expended. And the said defendant in mercy, &c. (Rob. Forms, 99.)

It is not usual, however, in practice with us to have the verdict so long. It is usually expressed with reference to the issue, thus, "We of the jury find for the plaintiff, and assess his damages at \$ —, with lawful interest thereon," &c.; and the record always recites the verdict *verbatim*.

ENTRY OF JUDGMENT FOR PLAINTIFF UPON NIL DICT.

And at another day, to wit: At rules held in the clerk's office of the said circuit court for — county, on the — day of —, in the year of our Lord eighteen hundred and seventy —, came the plaintiff by his attorney, and the defendant by his attorney having entered his appearance, *says nothing* in bar or preclusion of the plaintiff's action, whereby the plaintiff therein against him remains altogether undefended: Therefore, it is ordered that judgment be entered for the plaintiff against the defendant, for the damages which the plaintiff has sustained by occasion of the defendant's non-performance of the covenants in the declaration mentioned, which damages are to be inquired of by a jury at the next term.

And now at this day, to wit: At a circuit court held for — county, at the courthouse thereof on the — day of —, in the year of our Lord eighteen hundred and seventy —, came the plaintiff by his attorney; and the defendant being solemnly called, came not, and a jury, to wit, A. B. (*and eleven others*), being sworn diligently to inquire of damages in this suit, upon their oath do say, that the plaintiff hath sustained damages by occasion of the defendant's breach of the covenants in the declaration mentioned, to the amount of — dollars, with lawful interest thereon from the — day of —, in the year of our Lord eighteen hundred and seventy —, until paid: Therefore, it is considered by the court that the plaintiff recover against the defendant, his damages assessed as aforesaid, with interest thereon, to be computed after the rate of six *per centum per annum*, from the said — day of —, in the year of our Lord eighteen hundred and seventy —, until paid, and his costs by him about his suit in this behalf expended. And the said defendant in mercy, &c. (Rob. Forms, 65.)

2°. The *Amount of the Judgment*.

The *amount* for which judgment is to be entered must of course conform to the verdict, if there be a verdict, and de-

pende almost exclusively upon the provisions of statutes in Virginia, which, except in two or three particulars, are derived substantially from corresponding English statutes. The judgment, however, must be always *certain*, leaving nothing, as touching the amount, doubtful or unsettled. The judgment may indeed leave the costs to be adjusted by the clerk, for they are determined by law; but a judgment for "damages and expenses, according to law, and *the rules and regulations of the society*," without specifying the amount or nature of the damages and expenses, is *erroneous for uncertainty*. (Stratton v. Mut. Assur. Soc. 6 Rand. 30, 31, 32.)

In an action on a bond *conditioned for the payment of money*, (and by analogy, *on a penal bill*), judgment is directed to be given (as by the statute 4 & 5 Anne, c. 16), *for the penalty* to be discharged by the payment of the principal, and the interest due thereon. (V. C. 1873, c. 173, § 16.) And it may be worth while to observe, that where the penalty and the principal sum are the same, the instrument, according to its *legal effect*, is a *single bill*, and it should be treated accordingly, both in the manner of suing upon it, and in the judgment to be entered, which latter should be for the amount of the bond, with interest from the time of payment. (Fleming v. Toler, 7 Grat. 316.)

And in any action *for a penalty*, for the non-performance of a condition, covenant, or agreement, the plaintiff, (as by 8 & 9 Wm. III, c. 11), may assign as many breaches as he thinks fit, and shall *in his declaration*, &c., assign the specific breaches for which the action, &c. is brought, (at common law the rule against duplicity of pleading confined him to one only), and the jury having ascertained the damages, judgment is to be entered *for the penalty*, to be discharged by the payment of those damages, and of such further sums *in damages* as may afterwards be assessed upon a *scire facias* assigning a further breach. And any person injured *may* resort to such *scire facias*. (V. C. 1873, c. 173, § 17; Acts 1874-'5, p. 58, c. 77; Bac. Abr. Oblig. (F).) But it is a *privilege* which is thus conferred for a future claimant under the bond to resort to a *scire facias*. It is not an *obligation*. Such future claimant, or the same party claiming damages for subsequent breaches, may have recourse to a separate and independent action on the bond, instead of to the *scire facias*. (Sangster v. Com'th, 17 Grat. 135-'6; V. C. 1873, c. 12, § 7.)

In an action *on a contract*, where no jury is empanelled, judgment is to be entered for interest on the principal sum recovered, from the time the principal was payable, or expressly bore interest, until payment. And where a jury is empanelled, we have seen that they may allow interest, or not, at their discretion, not only in cases of *contract* but also

of *tort*; and of course judgment is to be rendered for such interest as they allow. (V. C. 1873, c. 173, § 14, 18.)

It may be stated here, although not specially relevant to this particular topic, that the common law in all actions of *contract* inexorably required the plaintiff to prove his contract against *as many persons as he alleged it*. He must recover against *all or none*. (Jenkins v. Hurt's Com'r, 2 Rand. 446; Rohr v. Davis, 9 Leigh, 30; Baber v. Cook, &c., 11 Leigh, 606.)

This principle having been often found to result in substantial injustice, has been modified by statute in Virginia, by enacting that, in actions on contract against several, although the plaintiff may be barred as to one or more, yet he may have judgment against such of them as he would have been entitled to recover from *had he sued them only*. (V. C. 1873, c. 173, § 19.)

But this act applies only to cases in which some of the parties are discharged upon grounds of defence *merely personal* to themselves, as infancy or bankruptcy, or that they had not *entered into the contract*. And where the defence goes to the *foundation of the entire contract*, such as illegality or failure of consideration, the case remains as at common law. (Brown's Adm'r v. Johnson, 13 Grat. 650; Steptoe v. Read, 19 Grat. 10; Moffett v. Bickle, 21 Grat. 280; Bush v. Campbell, 26 Grat. 428; Muse v. Farmer's Bank, 27 Grat. 254.) And so peremptory and exacting is this still subsisting rule of the common law, that if one of several joint contractors upon a joint action, *confesses judgment*, there can still be no *final* judgment even against him, until the issues as to the other defendants are disposed of; and if those issues *go to the foundation of the contract* as to all the parties to it, and do not merely discharge the defendants who have presented them, and are decided against the plaintiff, then no judgment can ever be entered upon the confession. And this principle applies not only to joint actions upon common law securities, but also upon *negotiable* securities, notwithstanding the statute, (V. C. 1873, 141, § 11), allowing an action of debt against all the parties thereto, or against any one or *any intermediate number* of them. The proper course in such cases is to record the confession at the time it is made, but to continue the cause as to any defendant so confessing judgment, until the case is ready for a final judgment as to all. That final judgment will be against all the defendants or *none*; and against *all* the plaintiff will recover the same amount of debt and costs, or he will recover nothing. (Bart. Pract. 128, 176; Cases *supra*.) This consequence, however, does not follow, if in pursuance of the statute just cited, the plaintiff sues all the parties, and upon one of them pleading

the general issue of *nil debet* verified by *affidavit*, discontinues his suit as to him, and gets judgment by default as against the others; for although the plea puts the whole declaration in issue, and would admit matter to be proved under it which would go to the foundation of the contract, yet it does not necessarily suppose such a defence, and it ought not to be presumed that it does. (*Muse v. Farmer's Bank*, 27 Grat. 256-'7.)

Joint actions for torts stand, as we have elsewhere seen, upon a different footing, tort-feasors, however sued, being liable severally as well as jointly. But although the plaintiff may take a separate judgment against some of the defendants in such an action, he cannot have more than one satisfaction; and if he continues to prosecute the rest, he ought to enter a *cesset executio* as to the first, until a trial is had as to the other defendants. And then the plaintiff may elect against which of them he will take his final judgment, and enter a *nolle prosequi* as to the rest; if he omits to do so, his suing out an execution determines his election to look to the execution-defendant, or defendants alone. (*Bart. Pract.* 262-'3; *Ammonett v. Harris*, 1 H. & M. 496; *Crane v. Humberston*, 3 Cro. (Jac.) 118; *Hill v. Goodchild*, 5 Burr. 2790.)

3°. The Doctrine Touching the Costs of the Suit.

Upon judgment, in most actions, whether upon issue, or by default, confession, &c., it has long formed a part of the sentence, that the defendant or plaintiff shall *recover his costs* of suit or defence; which costs it is the practice in England to have taxed by an officer of the court *at the time when the judgment was given*. (*St. Pl.* 110; *Id.* (Tyler's Ed.) 137.)

At common law no costs were allowed, the *amercement* of the vanquished party being his only punishment. They were first allowed *eo nomine* by the statute of Gloucester, 6 Edw. I, c. 1, to plaintiffs, although even at common law in actions for damages, the jury were accustomed to compute the costs as part of the damages. But no costs were allowed the defendant in any shape, till the statutes 23 Hen. VIII, c. 11; 4 Jac. I, c. 3; 8 & 9 Wm. III, c. 11; 4 & 5 Anne, c. 16, which very equitably gave the defendant the same costs as the plaintiff would have had in case he had recovered. (3 Bl. Com. 399; 2 Tidd's Pract. 945.)

The king in England neither pays *nor receives* costs; but the exceptions as to *receiving* costs are so numerous as well nigh to destroy that branch of the rule. (3 Bl. Com. 400, & n (13).) It is an established principle, that the United States pay no costs, although when successful they recover them. (*The Antelope*, 12 Wheat. 546; *U. States v. Hooe*, 3 Cr.

73; U. States v. Barker, 2 Wheat. 395.) And so it is declared, that in no case shall there be judgment for costs *against* the commonwealth, although she too has no scruple to recover them. (V. C. 1873, c. 204, § 13; Id. c. 181, § 16.)

In Virginia also, the costs down to the rendition of the judgment and the issuing of an execution, are taxed by the *clerk of the court* where the judgment is rendered; but not at the time when the judgment is given, being allowed in the judgment by the general designation of "the costs by him about his suit, (or about his *defence*,) in this behalf expended;" and the clerk computes or taxes the precise amount whenever he is required to do so, either for the purpose of including them in the execution, or for any other object. As for the costs attending the levying of an execution, or selling under it, they are computed by the sheriff or other officer who carries the execution into effect.

The rules prescribed by statute in Virginia which govern the recovery of costs, and determine their amount, are minute and particular. It will only be needful to state their general import; and in order to do so let us note, (1), The rules for awarding costs in Virginia; (2), The doctrine touching the allowance of costs against a personal representative, committee of a lunatic, &c.; (3), The doctrine touching the allowance of costs in frivolous and vexatious suits; (4), The privileges to poor persons touching costs; and (5), Security for costs;

W. C.

1^d. Rules for *Awarding Costs in Virginia*.

1^c. General Rule touching Costs.

The general rule is, that costs shall be awarded to the party *substantially prevailing*, against his adversary, even though such adversary be not a party on the record, if the suit be *for his benefit*. Thus, if in an action on an assigned bond, in the name of the *assignor*, for the *benefit of the assignee*, the suit be decided for the defendant, he may recover his costs against the assignee, although he is not a party on the record. (V. C. 1873, c. 181, § 8, 9; Pates v. St. Clair, 11 Grat. 22.)

2^c. Rules for Costs on *Motions, &c.*, and in *Chancery Causes*.

Upon *motions*, (other than for a judgment for money), and upon any *interlocutory order* or proceeding, the court may give or refuse costs at its discretion, unless it be otherwise provided. And when a demurrer is sustained to a plea in abatement (doubtless *any dilatory plea* is included), the court may give judgment for the plaintiff, with full costs to the time of sustaining it, (an attorney's fee only excepted); and when any other part of the pleading is adjudged insufficient, it may order all costs occasioned by

such insufficient pleading to be paid by him who committed the fault. (V. C. 1873, c. 181, § 4.)

In equity the costs are always in the discretion of the court, (V. C. 1873, c. 181, § 10.) And in every case *in an appellate court*, costs shall be recovered in such court by the party *substantially prevailing*. (V. C. 1873, c. 181, § 11.)

Although *in motions, &c.*, and *in chancery causes*, costs are thus in the court's discretion, yet, in the exercise of that discretion there is seldom a deviation from the general rule, (in other cases peremptory), to allow them to him who, in *substance, prevails*.

These are the *general rules* touching the allowance of costs. It will be proper now to notice some *special cases*.

2^d. Doctrine touching Allowance of Costs against a *Personal Representative, Committee of a Lunatic, &c.*

Costs awarded against a personal *representative*, or the *committee of a lunatic*, or of a *convict in the penitentiary*, are directed to be paid out of the estate committed to such fiduciary; unless the court shall enter of record, that if he had *prudently discharged his duty*, the suit or motion would not have been brought or made, and then the costs are to be paid out of *such fiduciary's own estate*, (V. C. 1873, c. 173, § 20; 2 Lom. Ex'ors, 382-'3, 500 & seq.) It should be observed, however, that where an executor sues upon promises alleged to be made to himself, and fails in his suit, he is to pay the costs; to be levied on the goods, &c., of the testator, in the hands of the executor, if so much he has; if not, then of his own proper goods. (Thornton v. Jett, 1 Wash. 138; Hawkins v. Berkeley, 1 Wash. 204; Carr v. Anderson, 2 H. & M. 361.) And so also it is, as is believed, as to costs in case of an action against an executor upon a cause of action arising out of his transactions touching the estate.

It is worth while to observe that, where a personal representative defendant pleads the single plea of "fully administered," and the issue is found for him, the plaintiff ought to have judgment for debt and costs *quando acciderint*,—that is, when assets come to his hands, and the defendant ought to have judgment against the plaintiff for the general costs of the action. And if, in such case, the defendant personal representative pleads *non-assumpsit*, and "fully administered," and the first is found for the plaintiff, and the second for the defendant, the judgment ought to be for the plaintiff, for his debt and costs *quando, &c.*; and defendant ought to have judgment for the separate costs of that issue. And lastly, if the defendant pleads both pleas, and the plaintiff declines to reply to the plea of "fully administered," or having replied to it, withdraws his replication without costs to the defendant, and the first issue is with the plaintiff, he

ought to have judgment for his debt and costs *quando, &c.*, and the defendant is not entitled to any costs. (Timberlake v. Benson, 2 Va. Cas. 348.)

3^d. Doctrine touching Allowance of Costs in *Frivolous and Vexatious Suits*.

It has long been the usage by statute in England, and in Virginia, in order to discourage *frivolous and vexatious suits*, either to deny costs altogether, or to limit the amount of them in cases where the verdict of the jury ascertains a formal cause of action indeed, but one so trivial as clearly to evince that spite and a litigious spirit, rather than a desire to redress a real injury, prompted the action. Our statutes at present enact one provision for actions *ex delicto*, and another for actions *ex contractu*.

(1), As to actions *ex delicto*.

In any personal action *not on contract*, if a verdict be found for the plaintiff on an issue, or otherwise, for less damages than \$10, he shall not recover, in respect to such verdict, *any costs*, unless the court enter of record that the object of the action was to *try a right* besides the mere right to recover damages for the trespass or grievance, in respect to which the action was brought, or that the trespass or grievance was *wilful or malicious*. (V. C. 1873, c. 181, § 6.)

(2), As to actions *ex-contractu*.

In any personal action *ex-contractu*, wherein it is ascertained that less is due to the plaintiff than twenty dollars, exclusive of interest, judgment shall be given for the defendant, unless the court enter of record that the matter in controversy was of *greater value than twenty dollars*, exclusive of interest, in which case it may give judgment for the plaintiff for what is ascertained to be due him, with or without costs as to it may seem right. (V. C. 1873, c. 181, § 7.)

Notwithstanding the comprehensiveness of this last provision (being made applicable to *any* personal action *ex contractu*), it can hardly be supposed to include any case not cognizable by a *justice of the peace*, and therefore, not actions on contracts *to do collateral things*. (V. C. 1873, c. 147, § 1). Nor is it supposed to be applicable where the amount is reduced to less than twenty dollars, exclusive of interest, not by payments, but by *set-offs*. (Larowe v. Harding's Adm'r 2 Va. Cas. 203; Maitland v. McDearman, 1 Va. Cas. 131; Ferguson v. Highley, 2 Va. Cas. 255; Pendred's Adm'r v. Pendred, 2 Va. Cas. 93; 1 Rob. Prac. (1st. ed.) 18.) Or at all events, in such cases the court will doubtless so certify as to carry the judgment and the costs.

4^d. Privileges to *Poor Persons* touching Costs; to sue or to defend in *Forma Pauperis*.

A poor person may be allowed *by a court* to sue, or to de-

send a suit therein, without paying fees or costs; whereupon he shall have from any counsel whom the court shall assign him, and from all officers, all needful services and process, without any fees to them therefor, except what may be included in the costs recovered from the opposite party. This is denominated suing (or defending) *in forma pauperis*. (V. C. 1873, c. 181, § 1.)

5^d. Security for Costs.

In general all persons, however impoverished, *may institute and defend suits*, and in so doing may require the services of officers, without being liable, either to pay for such services in advance or to give security to pay for them. The only compensation to the officer is that he has the privilege of collecting his fee bills like taxes, by distress, (V. C. 1873, c. 180, § 24); subject to have the proceedings quashed if the bill contains an error, (V. C. 1873, c. 180, § 20); and for a false fee bill *fraudulently* issued, very heavy penalties are denounced. (V. C. 1873, c. 190, § 21; Crim. Synops. 147.)

But when a *non-resident* of the State is *plaintiff*, he may be required by the defendant, or by any officer of the court, to give security for costs, on pain of having his suit dismissed.

"In any suit," says the statute, "(except where a *poor person* is plaintiff), there may be a suggestion on the record in court; or (if the case be at rules) on the rule docket, by a defendant, or any officer of the court, that the plaintiff is *not a resident of this State*, and that security is required of him. After sixty days from such suggestion the suit shall be dismissed, unless before the dismissal the plaintiff *be proved* to be a resident of the State, or security be given before the court or clerk, for the payment of the costs and damages which may be awarded to the defendant, and of the fees due and to become due in the suit, to the officers of the court." The security is to be *by bond payable to the Commonwealth*; but one obligor suffices if he is solvent. And the court may, on motion by defendant or officer, give judgment for as much as he is entitled to by virtue of said bond. (V. C. 1873, c. 181, § 2, 3; *Evans v. Bradshaw*, 10 Grat. 207; *Goodtitle v. Lee*, 1 Va. Cas. 123.)

The rules which are to govern the clerk in the taxing of costs will be found, V. C. 1873, c. 181, § 12 to 17;

And the fees of officers, V. C. 1873, c. 180.

See in regard to costs, 1 Rob. Pr. (1st ed.) 389, 503; 2 Tuck. Com. 323.

SECTION V.

5^b. Change of Parties *by Death or otherwise*.

At common law the death of either party pending the ac-

tion (if there were but one on that side), *abated it*. It is, however, admissible in some cases *to revive it*. Other circumstances also bring about a change of parties, so that it will be well, in the development of the subject, to consider :

- (1), The circumstances which *abate the action* ;
- (2), When the *cause is revivable* ;
- (3), The *mode of reviving actions* ;
- (4), The *consequences of revivor* ;
- (5), The *consequences of delay in reviving* ;

W. C.

1°. What Circumstances *Abate the Action* ; W. C.

1^a. General Doctrine touching the Circumstances which Abate the Action.

The circumstances contemplated as abating the action are the following, (V. C. 1873, c. 169, § 1) : (1), Death ; (2), Marriage *of a woman* ; (3), Insanity ; (4), Conviction of felony ; (5), Cessation of the powers of the personal representative, &c.

W. C.

1°. Death.

Where there is but *one party*, plaintiff or defendant, on a side, and he dies, the action abates, as has been said ; but it is admissible to revive it if it were originally maintainable by or against the representative of the decedent ; that is, if it be a personal action maintainable by or against the *personal representative*, and if a real or mixed action by or against the *heir or devisee*. (Davis v. Teays, 3 Grat. 270 ; Ruffners v. Lewis, 7 Leigh, 742.) The action of unlawful detainer, however, being against the party unlawfully detaining the possession of lands, is not in its nature capable of being revived *as to the defendant*, and therefore the death of the defendant terminates the proceeding. (Bart. Pr. 125-'6 ; Chapman v. Dunlap, 4 Grat. 36.) But although in such cases no judgment for possession of the land can be awarded, there seems to be no reason why, by analogy to the action of detinue, the cause may not be revived against the decedent's personal representative, so that there may be a judgment for costs in favor of the plaintiff. (Bart. Pract. 126.)

As to *personal actions*, all actions *ex contractu* are maintainable by or against the personal representatives of the parties to the contract, and are therefore revivable by or against them.

But actions *for torts* are not maintainable by or against the personal representatives of the parties concerned at common law, and therefore are at common law not revivable, the common law maxim as to them being, "*actio personalis moritur cum persona*." See 3 Bl. Com. 302 ; 1

Saund. 216 a, n (1). In this doctrine innovations have by degrees been introduced by statute, until it is at length established with us that a personal representative may sue and be sued, not only in *cases of contract*, but also in actions for the taking or carrying away *any goods*, or for the *waste or destruction of, or damage to, any estate* of or by his decedent, (V. C. 1873, c. 126, § 19, 20); and even in actions for bodily injuries, occasioned by the *wrongful act, neglect, or default* of any person or corporation, *whereby death is caused*. (V. C. 1873, c. 145, § 7.)

As the action of detinue for a chattel lies against an executor or administrator as such, only where the chattel *actually* came to the personal representative's possession, so detinue pending against a decedent at his death, may be revived against his personal representative under the statute V. C. 1873, c. 126, § 19, 20, only where the chattel demanded *actually* came to such representative's possession. Hence, in a *scire facias* against a personal representative in such case, it must either be suggested in the *scire facias*, or alleged in a declaration thereon, that the chattel came to the personal representative's possession; and if there be no such allegation, no judgment can be given against the representative. (1 Chit. Pl. 140; 1 Saund. 216 a, n (1); Allen v. Harlan, 6 Leigh, 42; Catlett v. Russell, 6 Leigh, 344; Hunt v. Martin, 8 Grat. 578.) And it may be remarked, that it seems that judgment in detinue against a personal representative as such, should be for the goods, or the alternative value, against the representative, *de bonis propriis*, and for the damages for detention, both in the decedent's and in the personal representative's own time, *de bonis testatoris*, or *intestati*. (Catlett v. Russell, 6 Leigh, 344.)

Where there are several parties, plaintiffs or defendants to an action, and one of them dies, the suit does not in general abate at common law, but *survives* to or against the survivors; and this is the rule also with us by statute, (V. C. 1873, c. 159, § 2.) And it is further provided by statute with us, that "*no suit shall abate as to a party sued jointly with another who shall die during the pendency of such suit; but in all cases where such suit would have abated before the passage of this act, the same shall be revived against the personal representative of the decedent, and proceed thenceforward as a separate action against such personal representative, as though such decedent had been a sole defendant.*" (Acts, 1875-'6, p. 11, c. 12.) By this enactment, the necessity and expense of a new suit against the representative of the decedent are saved; but

the statute does not make any action revivable which was not so before.

As to *real and mixed actions*, if the heir or devisee has any claims to the land in controversy, such actions, upon the death of the ancestor, have always been held to be revivable by or against him.

2°. Marriage of a *Feme*.

The marriage of a *feme* seems at common law to abate the action; but in no case so that it might not be revived against the husband, or by him; and this principle is recognized in Virginia by statute. (V. C. 1873, c. 169, § 1, 4.)

3°. Insanity.

Insanity seems at common law to abate the suit likewise; but it is always revivable by or against the party's *committee*, who has charge of his estate; and so it is in Virginia. (V. C. 1873, c. 169, § 1, 4.)

4°. Conviction of Felony.

When a person, other than a married woman, is sentenced to the penitentiary for more than a year, the convict's estate is committed by the county or corporation court of the county or corporation wherein his estate, or some part thereof, may be, to a person selected by the court, who is to manage the estate during the convict's confinement, with nearly the powers of an administrator, (V. C. 1873, c. 206, § 6 & seq); and actions by and against the convict must be brought and revived by and against such committee. (V. C. 1873, c. 169, § 1, 4.)

5°. Cessation of the Powers of a Personal representative, or Committee of a Lunatic or Convict.

Such a state of things obviously demands the introduction of new parties in place of those whose powers are expired, for which our statute accordingly makes provision. (V. C. 1873, c. 169, § 1, 4.)

2^d. Exceptions to the General Doctrine touching the Abatement of Actions; W. C.

1°. Where the Event which abates the Action occurs *after Verdict and before Judgment*.

"Judgment," says the statute, "may be entered as if the event had not occurred." (V. C. 1873, c. 169, § 1.)

2°. Where there are *several Parties* on the side on which the event occurs.

In case of *death*, the suit proceeds *by or against the survivors*; and the same provision seems to be by the statute inadvertently applied to *all the events* which abate an action; but it would seem in all the other cases besides death, the new parties, husband, &c., ought to be introduced, and the suit proceed against the new parties and

the survivors in conjunction. *Sed quære*, as to the committees of lunatics and convicts. (V. C. 1873, c. 169, § 2.)

3°. In a Suit *in Equity*, where the *number of parties exceeds thirty*.

If any one jointly interested with others dies or marries, the court in its discretion may nevertheless proceed, if all classes of interests in the case *are represented*, and no one will be prejudiced. (V. C. 1873, c. 169, § 9.)

2°. When the Cause is Revivable, especially in Case of Death.

This has been already explained, *ante*, p. 793-4.

3°. Mode of Reviving Actions; W. C.

1^d. The Nature of the Process to Revive Actions; W. C.

1°. Process to Substitute a *New Plaintiff*; W. C.

1^f. Process to Substitute a *New Plaintiff*, at the instance of a Successor of the Plaintiff.

See V. C. 1873, c. 169, § 4;

W. C.

1°. Writ of *Scire Facias*.

A writ of *scire facias* may be issued in the name of the commonwealth, addressed to the sheriff, &c., and bearing *teste* by the clerk of the court, reciting the pendency of the suit, the death of the plaintiff, and the qualification of his personal representative, and commanding the sheriff, &c., to *make known* to the defendant that he be at rules, or before the court, on a day designated, to show cause, if any he can show, why the action should not be proceeded with in the name of such personal representatives, &c. (Rob. Forms, 7; V. C. 1873, c. 169, § 4.)

2°. Motion to Revive.

Instead of a writ of *scire facias*, the law allows the revival to take place *upon the motion* of the plaintiff's successor, without even notice of the motion. (V. C. 1873, c. 169, § 4.)

2^f. Process to Substitute a *New Plaintiff*, at Defendant's Instance.

At the defendant's instance, the revival can take place only by means of the writ of *scire facias*. (V. C. 1873, c. 169, § 4.)

2°. Process to Substitute a *New Defendant*.

Whether the substitution is to be made at the instance of the plaintiff or defendant, it can be effected only by a writ of *scire facias*. (V. C. 1873, c. 169, § 4.)

2^d. Mode of Obtaining Process to Revive.

In *any stage* of any case, a *scire facias* may be sued out. The clerk of the court in which the case is may issue such *scire facias* at any time, and an order may be entered *at*

rules for a case to proceed in the name of the proper party, although the case be on the court docket. (V. C. 1873, c. 159, § 5.)

4°. Consequences of Revival of the Action; W. C.

- 1^d. The New Party (except in an appellate court) is *entitled to a continuance*, and may *amend the pleadings*.

This rule is obviously necessary to enable the new party to acquaint himself with the cause, and to prepare for a trial of it. In an appellate court no such preparation is to be made, and hence by statute no indulgence as *of right*, can be insisted on there. (V. C. 1873, c. 169, § 4.)

- 2^d. Where the Party whose Powers as Personal Representative, &c., Cease, is *Defendant*.

Plaintiff may proceed to final judgment against him, but not against him and his successor too. (V. C. 1873, c. 169, § 6.)

5°. Consequences of Delay in Reviving the Action.

If the party to be substituted for the plaintiff does not move to substitute, or apply for a *scire facias*, at or before the *second term* of the court next after that at which there has been made on the record a suggestion of the fact making revival proper, the plaintiff's suit shall be discontinued, unless good cause be shown to the contrary. (V. C. 1873, c. 169, § 7.)

SECTION VI.

- 6^b. Causes *neglected by the Parties*.

Any court in which is pending any case wherein, for *more than seven years*, there has been no order or proceeding but to continue it, may, in its discretion, order such case to be struck from its docket, and it shall thereby be discontinued. The court may direct such order to be published; and every such case may be reinstated on motion, within one year from the date of such order, but not after. (V. C. 1873, c. 169, § 8.)

SECTION VII.

- 7^b. Writ of Execution.

After judgment the successful party is in general entitled to *execution*, in order to put in force the sentence that the law has given.

For this purpose he sues out, at common law, any one of several writs, to which others have been added by statute in England, although with us the number is greatly and inconveniently reduced. Like the judgment, writs of execution are *supposed* to be actually awarded *in court*; but they are sued at pleasure after judgment, out of the proper office, which with us is the clerk's office of the court where the judgment was obtained. (St. Pl. 106; Id. (Tyler) 141; 3 Bl. Com. 412, &c; Bac. Abr. Execution.)

Let us take notice of, (1), The circumstances under which an execution issues; (2), The several sorts of execution, prior to 1st July, 1850; and (3), The several sorts of execution in Virginia since 1st July, 1850.

W. C.

1^o. The Circumstances under which an Execution Issues.

The consideration of the circumstances under which an execution issues will oblige us to note (1), The cases in which an execution may issue; (2), Within what period it may issue; (3), The conformity of the execution to the judgment, and quashing the same; (4), The effect in respect to executions of change of parties by death; (5), Whence execution is issued; (6), To what officer addressed, and whither returned; and (7), Doctrine touching additional executions;

W. C.

1^a. In what Cases an Execution may Issue.

At common law an execution is a writ employed to enforce the judgment of a *court of law*. The courts of equity, independently of statute, have only the *process of contempt*, (summons, attachment, sequestration, &c.) to compel parties to submit to their decrees. And they use that process still, and in the nature of things can use none other, for certain classes of decrees: *e. g.* decrees not to pay money nor to deliver property, but to do some *collateral thing*; as for example, to execute a deed, to cancel a writing, to forbear to make a publication, and the like. But when the decree is for the payment of money, or the delivery of property, it is a matter of some surprise that the legislature should have been so slow to adopt for the court of chancery, the prompt and convenient writs of execution so long familiar to the courts of common law. In England this is believed not to have been yet done; but in Virginia, we have had for many years, a provision by statute declaring that "a decree *for land, or specific personal property*, and a decree or order *requiring the payment of money*, shall have the effect of a judgment for such land, property or money, and be embraced by the word "judgment," when used in the provisions touching the enforcement of decrees, orders and judgments; but a party may proceed to carry into execution a decree or order in chancery other than for the payment of money, as he might have done independently of statute. (V. C. 1873, c. 182, § 1; Id. c. 133, § 20 & seq; Windrum v. Parker; 2 Leigh, 361.)

Executions with us, therefore, issue from *courts of law* to enforce their *judgments*, and from *courts of chancery* to enforce their *decrees* for the *delivery of property*, real or personal, or for the *payment of money*.

2^a. Within what Period Execution may issue.

Regularly, an execution does not issue until after the adjournment of the court; but any court is with us allowed by statute, after the fifteenth day of its term, to make a general order allowing executions to issue on judgments, and decrees after ten days from their date, although the term be not ended. And for *special cause*, it may in any particular case, except the same from such order, or allow an execution thereon at an earlier period. (V. C. 1873, c. 173, § 21.) After the expiration of the term no order of court is required, and in the absence of directions to the contrary, executions always issue as soon after the term is ended as may be. The attorney, if not otherwise instructed by his client, may postpone the issue; may direct on what property the execution shall be levied; and may control the proceedings after levy. Payment to the attorney by the debtor or officer will be good; but without special authority the attorney can neither compromise nor assign a claim; nor receive in payment anything but money; although in a general depreciation of currency, when none other is in circulation, instructions from the client to collect will easily be presumed to imply a direction to collect in the only practicable currency. (Bart. Pract. 268; Evans v. Grenhow, 15 Grat. 159; Smith v. Lambert, 7 Grat. 141; Smock v. Dade, 5 Rand. 639; Pidgeon v. Williams, 21 Grat. 251; Johnson v. Gibbons, 27 Grat. 636-'7; Hill v. Bowyer, 18 Grat. 364.)

Executions are expected properly to be sued out *within a year* from the date of the judgment, yet they may notwithstanding, in many cases, be obtained afterwards, (V. C. 1873, c. 182, § 12), sometimes by means of a writ of *scire facias*, or an action on the judgment, and sometimes without any process thereon, as a matter of course. If *within the year*, an execution *issues* (by which is understood its being *made out and signed by the clerk*, ready for the sheriff), other executions on the same judgment may be issued without *scire facias*; or a *scire facias* or action on the judgment may be brought, *within ten years* from the return-day of an execution on which there is no return by an officer, or within *twenty years* from the return-day of an execution on which there is such return; except that where the *scire facias* or action is against the personal representative of a decedent, it shall be brought within *five years* from the qualification of such representative. If *no execution* has been sued out *within the year*, it is necessary to employ a *scire facias*, or an action in order to obtain one, and the limitation to either is *ten years* from the *date of the judgment*.

But if the execution be sued out, in derogation of these provisions, after the lapse of the time prescribed, without

any previous proceeding by writ of *scire facias* to authorize it, the irregularity does not make the execution void, but only voidable. It may be quashed or set aside by the court whence it issued, on motion of the defendant, founded on notice to the plaintiff. But as it is not void, it cannot be avoided in a collateral suit. (Beale v. Botetourt, 10 Grat. 281.)

In computing the foregoing limitations, the following periods are to be omitted, viz:

- 1, The time between January 1, 1869, and March 29, 1871;
- 2, The time during which the right to sue out execution on the judgment is suspended by the terms thereof, or by legal process, such as injunction or writ of *supersedeas*;
- 3, The time of any disability of infancy, coverture, or insanity, which may exist when the right to sue execution accrued, and the period above designated after the removal of such disability, so as in no case to *exceed twenty years* from the right accrued;
- 4, The time during which the party (supposing him to have before resided in Virginia), has, by departing therefrom, or by absconding or concealing himself, or by any other indirect means, obstructed the prosecution of the right;
- 5, The time of one year after the abatement, arrest, or renewal of the proceedings to enforce the judgment, or the loss or destruction of papers in such proceedings, the same having been commenced in due time:

See V. C. 1873, c. 182, § 13; Id. c. 146, § 18 to 22; Hutsonpillar's Adm'r v. Stevens' Adm'r, 12 Grat. 579.

3^d. The Conformity of the Execution to the Judgment, and Quashing the same.

The execution must, of course, correspond with the judgment, in respect of *amount, parties, &c.*; and if in any material particular irregular or variant, it may be *quashed*, after reasonable notice to the adverse party, by the court whence it issued, or if that were the *circuit court*, by the judge in vacation. (V. C. 1873, c. 183, § 40; Beale v. Botetourt, 10 Grat. 282; Moss v. Moss, 4 H. & M. 293.)

And when a *judgment* is set aside, any execution *falls with it*, without an express order to quash it. (Charron v. Boswell, 18 Grat. 216.) It is worthy of observation further, that an execution is not to be quashed on the ground that before it issued, money *was tendered* in payment of the judgment, unless the tender was followed by the payment of money into court, and a motion to enter satisfaction on the record. (Shumaker v. Nichols, 6 Grat. 592.) Our statutes are particularly strict in requiring the execution to conform to the judgment *in respect to the parties thereto*. Thus it is declared that where a judgment is against *several persons*

jointly, executions thereon shall be *joint against them all*, (V. C. 1873, c. 183, § 20.) And although judgment be entered against the several parties, as is by statute allowed, at different times, yet when judgment is entered against all, the execution is to follow the judgment, and include all the parties. (Walker v. Com'th, 18 Grat. 13.)

The execution is commonly to be controlled and issued by the party who has obtained the judgment, and its regularity and validity are to be objected to and resisted only by the party against whom it is rendered. But where a stranger has acquired an equitable right to the benefit of an execution, or to the property on which it is levied, he may do either of those things, always, however, in the name of the *legal party* to the process, or of one who can become such. Nor is the legal party allowed to intervene to defeat or obstruct the stranger's proceedings. (Wallop v. Scarburgh, 5 Grat. 1.)

In connection with the issuing of executions, it may be remarked, that where a decree in chancery directs land to be sold unless a certain sum of money is paid by a day specified, it is not competent to the clerk, of his own authority, to issue an execution on the decree, without an order of court. (Shackleford v. Apperson, 6 Grat. 451.)

4^d. Effect, in respect to Executions, of *change of Parties by Death*.

The effect of a *change of parties by death or marriage, &c.*, after judgment, deserves some consideration here. If there is but one party, plaintiff or defendant, and he dies *before execution* issued, the judgment must be revived by *scire facias*, before execution can be sued out. (V. C. 1873, c. 169, § 4.) If there are *several plaintiffs or defendants*, and one dies, the judgment *survives* as to the survivors, and execution may be issued at once *for or against* them, (V. C. 1873, c. 169, § 2,) whilst as to the personal representatives of the deceased (or in a real or mixed action, as to the heir or devisee,) the judgment may be revived, and execution issued by means of an action upon the judgment, or, as is presumed, a writ of *scire facias*. (V. C. 1873, c. 141, § 13; Roane's Adm'r v. Drummond's Adm'r, 6 Rand. 182.) If the death occur *after the execution issued*, it is to be levied (being in its nature *entire*), without regard to the death, as if all the parties were living. (2 Tuck. Com. 341.)

The same general principles apply in the case of the marriage of a *feme plaintiff or defendant*, or in case of a change of parties otherwise. (V. C. 1873, c. 169, § 4.)

5^d. Whence Execution should be issued.

As to *whence* the execution should issue, it must generally

be from the clerk's office of the court which *pronounced the judgment*. However, the statutes provide, that when any judgment, decree, or order of a *county court* is reversed or affirmed, the cause shall not be remanded to said court for further proceedings, but shall be retained in the circuit court, and *there proceeded in*, unless by consent of parties, or for cause shown, the appellate court direct otherwise, (V. C. 1873, c. 178, § 25); and in case of appeal to the court of appeals, the circuit or corporation court whence the cause came shall enter the decision of the appellate court as its own, and execution may issue thereon accordingly. (V. C. 1873, c. 178, § 29.)

6^d. To *what Officer* Execution should be Addressed, and *whither Returned*.

The execution, which runs in the name of the commonwealth, and bears *teste* by the clerk of the court, may be addressed to *any sheriff or sergeant* in the commonwealth, to be executed within their respective counties or corporations, and is not invalidated by being directed to *no officer*, or by being served by one, when addressed to another. (V. C. 1873, c. 166, § 2; Couch v. Miller, 2 Leigh, 549.) It is returnable like original process, within ninety days after its date, to the court, on the *first day of a term*, or in the clerk's office to the *first Monday* in a month, or to *some rule-day*, (V. C. 1873, c. 166, § 2); and although original process made returnable to a day which is not a return-day is *void*, it is questionable whether *an execution is*. (Shirley v. Wright, 2 Lord Raym. 776; Parsons v. Lloyd, 2 Wm. Bl. 846-7; Kyles v. Ford, 2 Rand. 4; Hare v. Niblo, 4 Leigh, 359.)

7^d. Doctrine Touching Additional Executions.

A party is not restricted to one execution at a time. *At his own costs* he may have at once as many as he pleases; but of course he is entitled to but one satisfaction, and it is therefore *at his peril*, if he vexes his adversary with an execution after that satisfaction has been already obtained. (V. C. 1873, c. 184, § 18.) And it should be carefully noted, that if the plaintiff sue out a second execution before the property taken by virtue of the first is disposed of, he waives the first execution, and destroys its lien on the property. (Eckhols v. Graham, 1 Call. 492; McKey v. Garth, 2 Rob. 38, 38; Windrum v. Parker, 2 Leigh, 361.)

2^c. The Several Sorts of Executions, Prior to July 1, 1850.

See Bac. Abr. Ex'on, (A), (C), &c.; 3 Th. Co. Lit. 572.

Previous to 1st July, 1850, (when the Revised Code of 1849 took effect), the most important executions in Virginia might be thus classified, namely: (1), Executions to regain possession of specific property; (2), To compel the doing of some

specific thing; and (3), To compel the payment of money; W. C.

1^d. Executions to Regain Possession of *Specific Property*; W. C.

1^o. Executions to Regain Possession of *Real Property*; W. C.

1^f. Writ of *Habere Facias Seisinam*.

To obtain possession of a *freehold*. (Bac. Abr. Ex'on, (C) 5.)

2^f. Writ of *Habere Facias Possessionem*.

To obtain possession of a *term for years*. (Bac. Abr. Ex'on, (C) 5.)

2^o. Executions to *Regain Possession of Chattels*.

There was neither at common law, nor with us, prior to 1850, any adequate execution; nothing better than a writ of *distringas*, to be explained in the sequel.

2^d. Executions to compel the Doing of *some Specific Thing*; W. C.

1^o. Writ of *Quod Nocumentum Amoveatur*.

This writ is employed in order to cause a nuisance to be abated or removed.

See Jac. Law Dict'y, Ex'on.

2^o. Writ of *Distringas*.

This writ commands the officer to distrain the party by his goods, and the profits of his lands, until he shall obey and submit to the judgment of the court.

See Jac. Law Dict'y, Ex'on.

3^d. Executions to Compel the *Payment of Money*; W. C.

1^o. Writ of *Capias ad Satisfaciendum*.

This writ commands the officer to take *defendant's body*, and keep it safely (in prison, of course,) to satisfy the plaintiff of his judgment and costs. (Rob. Forms, 364.)

It lay at common law, only *at the suit of the king*. By Stat. 13 Edward I, c. 11, it was allowed in actions of *account*; by 25 Edward III, c. 17, in actions of *debt and detinue*; by 19 Henry VII, c. 9, in actions of *trespass on the case*, and by 23 Henry VIII, c. 14, in actions of *trespass*. (Bac. Abr. Ex'on, (C) 3; 3 Bl. Com. 414 & seq.)

The writ of *capias ad satisfaciendum* was virtually abolished by the Code of 1849. (V. C. 1873, c. 184, § 1, 2, & n *.)

2^o. Writ of *Fieri Facias*.

This writ commands the officer to cause the amount of the judgment, with interest and costs, *to be made out of the goods and chattels* belonging to the defendant. (Rob. Forms, 389 & seq.)

It seems to have existed at common law, (Bac. Abr. Ex'on, (C) 4; 2 Reeve's Hist. Eng. Law, 187; 3 Bl. Com. 417 & seq.)

3°. Writ of *Levari Facias*.

This writ commands the officer to cause the amount of the judgment, with interest and costs, *to be levied* out of the defendant's *goods* and the *profits of his lands*.

It seems to have existed at common law. (Bac. Abr. Ex'on, (C) 4.)

The Code of 1849 enacts that "no writ of *levari facias* shall be issued hereafter," that is, after 1st July, 1850. (V. C. 1873, c. 183, § 21.)

The abolition of this writ was of little consequence. So far as it related to chattels, it was not more effective than a *feri facias*; and as regards lands, it was a less expedient execution than the *elegit*.

4°. Writ of *Elegit*.

This writ, as it existed prior to 1850, commands the officer to put the plaintiff in possession of the defendant's *chattels*, (except *beasts of the plough*) at a valuation to be made by a jury; and if the debt is not thereby satisfied, to cause to be delivered to him by *reasonable extent*, at an *annual rent*, to be also determined by a jury, one-half of the defendant's *freehold lands*, to hold until, at the rent assessed, the residue of the judgment, with interest and costs, shall be discharged. (Rob. Forms, 371, 343.)

The writ of *elegit* did not exist at common law. It would have been repugnant to feudal policy, which did not admit of the alienation of lands. It was given by 13 Edw. I, c. 18. See 1 R. C. (1819), p. 525; Bac. Abr. Ex'on, (C) 2.

3°. The several sorts of Execution in Virginia, since 1st July, 1850.

In explaining the existing law in Virginia, touching executions, a similar classification will be adopted as prior to the 1st July, 1850, omitting any mention of those executions which have been designated as abolished. Some explanation of the writ of *elegit*, however, will be given; for although at present abolished, it cannot be supposed but that so useful and convenient a process will ere long be reinstated.

It should be remarked, (having been omitted in its proper place), that although the writ of *capias ad satisfaciendum*, at the pleasure of the creditor, has been abolished as above described, yet the defendant may still be arrested by order of a commissioner in chancery, and by thus *attaching* his person, be compelled to answer fully, and to the satisfaction of the commissioner, the interrogatories of the creditor touching his property, and to convey the same, and deliver possession thereof, in order to satisfy the judgment, (V. C. 1873, c. 184, § 5 to 8); and if he fail to answer the interrogatories, or answer evasively, and the creditor shows by *affidavit* pro-

bable cause to believe that he is *about to quit the State*, unless forthwith apprehended, he may be arrested by order of such commissioner in chancery, (before whom the proceedings to compel the discovery, &c., are had), and kept in jail until proper answers are filed, and proper conveyances and delivery of the property be made, or until the court, or a circuit judge shall direct his discharge. (V. C. 1873, c. 184, § 8.)

The doctrine touching executions *under the present code* may be presented according to the analysis following, viz: (1), Executions for specific property; (2), Executions to compel the doing of some specific thing; (3), Executions to enforce the payment of money;

W. C.

1^d. Executions for *Specific Property*; W. C.

1^o. Executions to *Regain the Possession of Real Property*; W. C.

1^f. Writ of *Habere Facias Seisinam*.

To regain possession of a *freehold*. (Bac. Abr. Ex'on, (C) 5.)

2^f. Writ of *Habere Facias Possessionem*.

To regain possession of a *term for years*. (Bac. Abr. Ex'on, (C) 5.)

3^f. Writ of *Possession*.

Our statutes (enacted in the revival of 1849), declare that on judgments for the recovery of specific property, *real or personal*, a *writ of possession* may issue for the specific property, which shall conform to the judgment as to the description of the property, and the estate, title, or interest recovered; and there may be also issued a writ of *feri facias* for the damages or profits, and costs. (V. C. 1873, c. 183, § 23.)

The former writs of *hab. fac. seis.* and *hab. fac. pos.* not being abolished, are presumed to be reserved, along with other writs *remedial and judicial*, given by the common law, or by any act of parliament prior to 4 Jac. I., not local to England, &c. (V. C. 1873, c. 15, § 1, 2.)

2^o. Executions to *Regain the Possession of Specific Personal Property*; W. C.

1^f. Writ of *Distringas*.

This writ commands the officer to distrain the defendant *by his lands and chattels*, so that he deliver to the plaintiff the chattels for which the latter has in the action of *detinue* obtained a judgment against him. (Rob. Forms, 366.)

The common law allows no other or better execution than this to give effect to the action of *detinue*. Supposing the defendant to have no lands, and to be possessed of no chattels save those ascertained by the judg-

ment to be the property of the plaintiff, he might set his adversary at defiance, and might remain indefinitely in the enjoyment of the plaintiff's goods. The very simple and obvious expedient of taking from the defendant the goods found to belong to the plaintiff, and restoring them specifically to the rightful owner, was only resorted to in 1850, although an ineffectual and very awkward attempt to achieve the same result had been made, by act of March, 1839. (Jac. Law Dict. Ex'on.)

2^f. Writ of *Possession*.

The statute allowing the *writ of possession* being applicable as well to lands as to chattels, (although far more needed as to the latter, the common law executions in order to regain possession or seisin of lands having been very satisfactory), has been already stated. See *Ante*, p. 803; V. C. 1873, c. 183, § 23.

2^d. Executions to *Compel the Doing of some Specific Thing*; W. C.

1^o. Writ of *Quod Nocumentum Amoveatur*.

This writ is employed in order to abate and remove a nuisance. (Jac. Law Dict. Ex'on.)

2^o. Writ of *Distringas*.

In the nature of things there cannot be a more satisfactory and efficient means than the writ of *distringas* to oblige a party to comply obediently with the order of a court touching the doing of a specific thing other than the payment of money, save only where the order or judgment determines the right and title of specific property, real or personal, to be in the plaintiff. It is true that the courts of law do not often have occasion to make such orders; but it is difficult to imagine why, if they should be called on to make an order of that kind, they should be denied the best and the ancient means of compelling obedience to it. Yet our legislature has thought fit to enact that no writ of *distringas* shall be issued, except on a judgment for *specific personal property*. (V. C. 1873, c. 183, § 21. See 3 Bl. Com. 413.) In case of such a judgment it is provided that the plaintiff may, at his option, have *fiery facias*, for the alternative value of the chattel recovered, (instead of a *writ of possession*,) and the damages and costs. Or he may have a writ of *distringas*. And if a *distringas* issue, the court, on the motion of either party, may order it to be superseded as to the specific thing, and to be executed in lieu thereof, for the alternative value. (V. C. 1873, c. 183, § 24, 25.)

3^d. Executions to *Compel the Payment of Money*.

Executions to compel the payment of money are incomparably the most frequently called into requisition, and the

learning concerning them is so much a matter of almost daily use in practice, that the student cannot be too careful to make himself master of the subject. We have now in Virginia but a *single writ of execution* directly adapted to this purpose, namely, that of *feri facias*, directed against the *debtor's personal chattels in possession*; the writ of *elegit*, whereby his lands were subjected, having been abolished by act of 1871-'2! (V. C. 1873, c. 183, § 26.)

But notwithstanding the writ of *elegit* has thus been abolished, it is conceived that it must so soon be restored, that it will be expedient to notice it; besides that, questions connected with it must linger for years in the courts of Virginia.

Any great detail, however, is spared, because a copious explanation of the leading doctrines upon the subject has been given in 2 Insts. Com. & Stat. Law, 284 & seq.

W. C.

1°. Execution of *Elegit*.

The writ of *elegit* derives its name from the practice which originally prevailed, of accompanying the suing of it out with an entry on the record that the plaintiff *hath chosen* (*elegit*) to charge the lands of the defendant, as well as his goods.

At common law lands (from feudal considerations) were not generally liable to execution, except for debts due the Crown. But *Magna Charta* (9 Hen. III, c. 1,) having made them to some extent alienable, they were, by 13 Edw. I, c. 18, subjected to debts, or at least a *moiety* was, provided there were not personal chattels enough (besides *beasts of the plough*,) to satisfy the judgment. Accordingly the execution of *elegit* was directed first against the debtor's goods, (with the exception just stated of *oxen* and *beasts of the plough*,) including *terms for years* in lands, (2 Tuck. Com. 375,) and if that were insufficient, then *one-half* of all the lands whereof, on the day of the judgment, or afterwards, he was *seised*; and the same were delivered by the sheriff to the creditor, at a valuation made by a jury summoned for the purpose, the goods as his own absolute property, and the lands, until at the annual valuation or rent as assessed by the jury, the residue of the debt, after deducting the value of the chattels, should be discharged. (3 Bl. Com. 418; Bac. Abr. Ex'on, (A) and (C), 2.)

Down to July 1, 1850, this was, with scarce a variation, the law of Virginia. The Code of 1849, however, applied the writ to *lands only*, omitting the goods altogether, and caused it to embrace, not only a *moiety* of the *freehold lands* of the debtor, but the *whole* of his lands, *leasehold as well as freehold*.—"all of the real estate of or to which

the defendant was *possessed or entitled*, on or after the date of the judgment." (V. C. 1860, c. 187, § 2, 7 to 10.)

The statute prescribes the form of the writ, and also the form of the sheriff's return, including the inquisition of the jury as to the annual value of the land delivered to the plaintiff. (V. C. 1860, c. 187, § 8, 9.)

The effect of a judgment (or decree) for money, (in consequence of its being practicable, by means of a writ of *elegit*, to reach and subject the lands of the debtor to its payment), is by the statute declared to be to *create a lien on all the real estate* of or to which the debtor was *possessed or entitled*, at or after the *date of the judgment*; or if it was rendered in court, at or after the *commencement of the term* at which it was so rendered. (V. C. 1860 c. 186, § 6.)

And although the original reason and source of the lien of the judgment has been abolished, the lien itself is still retained in the same words as above quoted (V. C. 1873, c. 182, § 6.) But in order that this lien may continue as against a *purchaser for valuable consideration*, and without notice, it is required that the judgment shall be *docketed* in the clerk's office of the court of the county or corporation wherein the real estate is, (or if it be within the city of Richmond, in the clerk's office of the chancery court of the city), *within sixty days* after the date of such judgment, or fifteen days before the conveyance of the land to such purchaser. (V. C. 1873, c. 182, § 3, 4; Acts, 1876-'7, p. 270, c. 260.) And it may be observed, that a like prudent policy is adopted in regard to most, if not all, liens on lands, namely, to *require them to be registered*. Thus a *lis pendens*, and an attachment against a non-resident, operate no lien as against a purchaser without actual notice, unless they are respectively *docketed* in the clerk's office of the court of the county or corporation where the land lies. (V. C. 1873, c. 182, § 5.)

The *lien* of a judgment has long been regarded as a proper subject of equity cognizance, a lien being in the *nature of a trust*. And so well established is the jurisdiction of the court of chancery in such cases, that for very many years it has been deemed needless to issue a writ of *elegit* at all in order to enable the creditor to proceed in equity.

The legislature of Virginia, however, has enacted that the lien of a judgment may *always* be enforced in a court of equity. And if it appear to the court that the rents and profits will not satisfy the judgment *in five years*, the court may decree the estate, or any part of it *to be sold*, and the proceeds applied to the discharge of the judgment. (V. C. 1873, c. 182, § 9.) And the court of equity is now

the *only agency* in Virginia to subject lands to the judgment-debts of private persons.

See as to judgment-liens and the law relating thereto, 1 Lom. Dig. 367 & seq; 2 Tuck. Com. 372 & seq; 1 Rob. Pr. (1st. ed.) 540 & seq; 2 Insts. Com. & Stat. Law, 284 & seq.

In the same spirit which prompted the abolition of the writ of *elegit*, the legislature has enacted that all judicial sales of real estate, under decrees or orders rendered after the date of the act (1869-'70), for the payment of debts contracted or liabilities incurred prior to 10th April, 1865, shall be *upon a credit* of not less than three, nor more than six, equal instalments, payable *annually* from the day of sale, except for so much as may be necessary to pay the costs of suit and sale, which shall be required in cash; but the defendant may, *in writing*, waive the benefit of this provision, and for persons under disabilities, the court may make such waiver.

Nor is this all the advantage conferred on the debtor at the creditor's expense. At such sale, in the case above supposed, the land is not to be sold at the *first or second exposure*, for less than *three-fourths of its assessed value* at the last official assessment for taxation: But here also, the party whose property is to be sold may, *in writing*, waive the benefit of the provision. (V. C. 1873, c. 174, § 3, 4.)

Such legislation cannot be too gravely deplored, for the moral effect which it produces; but it is believed that, applying, as it does, to pre-existing contracts, it will be held to *impair their obligation*, and *as to them*, to be void. (Cool. Const'l Lim'ns, 290; McCracken v. Hayward, 2 How. 608; Bronson v. Kinzie, 1 How. 311. Gantley's Lessee, v. Ewing, 3 How. 707; Gunn v. Barry, 15 Wal. 622-'3; Homestead Cases, 22 Grat. 293 & seq.)

We have now to notice one of the most mischievous and demoralizing of modern devices, by which creditors are defrauded of their debts, debtors of their integrity, the industrious poor of pecuniary credit, and the general community of a free alienation of property, for the benefit of a certain class of persons, comparatively few in number, whose chronic misfortunes provoke so much pity as to silence discretion, and drown all considerations of the public good. Allusion is made, of course, to those laws which exonerate from a man's debts vast proportions of his property; laws which, when they modestly cover the debtor's household furniture only, are styled, in bitter but unconscious mockery, "*poor man's laws*;" and when they extend to protect against the claims of honesty and justice "*the homes of the people*," are denominated "*Homestead-exemp-*

tion laws." We have long had in Virginia "*a poor man's law*," applicable to domestic chattels alone, which will be referred to in connexion with the writ of *feri facias*; but we never had a "*homestead-exemption law*" until 1867, (Acts, 1866-'7, p. 962, c. 139), and there was none in *practical operation* until it was ordained by the constitution of 1869, (Art. XI, § 1 & seq.)

The constitution of 1869 provides that every *householder or head of a family*, in addition to the articles now exempt from levy (that is, under the poor man's law), shall be entitled to hold, *exempt from levy or sale*, under any *execution, order, or other process*, (but not by virtue of any *mortgage, deed of trust, pledge, or other security thereon*), for any debt *heretofore or hereafter contracted, real and personal property, or either*, to be selected by him, to the value of not exceeding \$2,000.

But not to extend to any execution &c. issued on any demand:

(1), For the *purchase-price of said property*, or any part thereof;

(2), For *services by a laborer or mechanic*;

(3), For liabilities incurred by a *public officer*;

(4), For *taxes, levies or assessments*, accruing after 1st June, 1866;

(5), For rent *hereafter accruing*; that is, as is supposed, after the date of the act, which was June 27th, 1870;

(6), For legal or taxable *fees of any public officer hereafter accruing*;

To which the statute passed in pursuance of the constitution adds:

(7), For any debt or contract, as to which the debtor or contractor has *waived the exemption* in the writing evidencing the debt or contract. (V. C. 1873, c. 183, § 3, 15.)

The general assembly was required to give effect by law to these constitutional enactments, and to prescribe the manner and conditions of holding the property exempted for the benefit of the debtor and his family. And accordingly, a very long statute was passed, including the provisions of the constitution, and something more. See V. C. 1873, c. 183, § 1 & seq.

The validity of the constitution, and of the statute in pursuance of it, was immediately questioned, so far as the exemptions were sought to be applied to debts contracted *prior to the adoption of the constitution*, on the ground that such exemptions "*impaired the obligation*" of the previous contract, and therefore, were repugnant to the constitution of the United States, (Art. I, § x, 1), which forbids *any State*, whether by constitution or act of its legislature, to

"pass any law impairing the obligation of contracts." This view was sustained by the supreme court of appeals, with a conclusive array of reasoning and authorities in the homestead cases, (22 Grat. 266, 282 & seq.)

A State can no more impair the obligation of a contract by adopting *a constitution* than by passing *a law*. (Dodge v. Woolsey, 18 How. 334; White v. Hart, 13 Wal. 646; Gunn v. Barry, 15 Wal. 623.)

And whilst it is competent for a State to change the *form of the remedy* for a contract, or to modify it otherwise, as it may see fit, provided that no substantial right secured by the contract is thereby impaired; yet any law which in its operation amounts to a denial or obstruction of the rights accruing by a contract, though *professing* to act only on the remedy, is directly obnoxious to the prohibition of the constitution. (Fletcher v. Peck, 6 Cr. 87; Green v. Biddle, 8 Wheat. 1; McCracken v. Haywood, 2 How. 608; Sturges v. Crowninshield, 4 Wheat. 122; Ogden v. Saunders, 12 Wheat. 213; Bronson v. Kinzie, 1 How. 311; Planter's Bank v. Sharp, 6 How. 327; Curran v. Arkansas, 15 How. 304, 319; Van Hoffman v. City of Quincy, 4 Wal. 553; Hawthorne v. Calef, 2 Wal. 10; White v. Hart, 13 Wal. 646; Gunn v. Berry, 15 Wal. 623; Taylor v. Stearns, 18 Grat. 244; Bank of Old Dominion, v. McVeigh, 20 Grat. 457; Homestead Cases, 22 Grat. 288 & seq.)

Every law which undertakes to exempt from levy and sale *any considerable proportion* of a debtor's effects "impairs the obligation" of all contracts with him existing at the date of the law; so also does a law forbidding the sale of property, unless it shall bring a certain proportion of its assessed value. (McCracken v. Haywood, 2 How. 608; Planter's Bank v. Sharp, 6 How. 327; Gunn v. Berry, 15 Wal. 622-'3; Homestead Cases, 22 Grat. 293 & seq); but not a law directing a sale of chattels under execution on twelve months' credit. (Garland v. Brown, 23 Grat. 173.)

Gunn v. Berry, 15 Wal. 622, was a decision of the supreme court of the United States upon the validity of the homestead exemption law of Georgia, as to contracts *existing at the time of its enactment*. As in Virginia, the exemption had been incorporated into the constitution; but the supreme court pronounced it to be void as to such existing contracts. In the argument of that case, it was stated by counsel, as illustrative of the infatuation which prompts to the enactment of such laws, that if every person in Georgia entitled under the law to a homestead should claim it, there would be thus appropriated and withdrawn from circulation and from business, by this new

"family law," more than three times the entire value of the land in the State. (S. C. 615-'16.)

A resort to a court of equity where the debtor, after the judgment lien had attached, has sold his lands to various purchasers in succession, is generally indispensable in order to lay the burden at once where it belongs, and to avoid a multiplicity of suits. In such cases, it has long been the established practice in equity, to subject the lands in the hands of the successive alienees in the *inverse order of their purchases*, taking that in the hands of the last purchaser first, &c.; and this rule is now confirmed by statute, as well in regard to volunteers, as purchasers for value; any part retained by the debtor himself being of course, liable first of all to the satisfaction of the lien. (V. C. 1873, c. 182, § 10. See *Conrad v. Harrison*, 3 Leigh, 582; *McClung v. Beirne*, 10 Leigh, 394; *Rodgers v. McClure*, 4 Grat. 81; *Jones v. Myrick*, 8 Grat. 179; *Michaux v. Brown*, 10 Grat. 612; *Hale v. Home*, 21 Grat. 42.)

Where the purchasers *bought* at the same time, even though the *conveyances* are on different days, the rule in equity is to charge the liens *ratably*, upon the several parcels sold, in proportion to the price paid for them, supposing that to be a fair measure of their comparative value. (*Alley v. Rogers*, 19 Grat. 366.)

2°. Execution of *Fieri Facias*.

The writ of *fieri facias* commands the officer that he *cause to be made* out of the *goods and chattels* of the defendant, the sum or debt recovered, except in debts due the crown or commonwealth, when it extends to the *debtor's lands* also. (3 Bl. Com. 417 & seq; Bac. Abr. Ex'on, (C) 4.)

Under this head, which is necessarily copious, (this being now the *only execution* allowed in Virginia, whereby to enforce the payment of money, as it was always the *principal* one), we must consider several subordinate divisions, namely: (1), The *form and tenor* of the writ of *fieri facias*; (2), *Whose property* may be taken under the writ; (3), *What kind of property* may be taken under the writ; (4), *Mode of levying* the writ; (5), The *time* at which the writ may be levied; (6), The *lien* of a *fieri facias*; (7), *Forthcoming or delivery-bond*; (8), *Proceedings* after levy of a *fieri facias*; (9), *Proceedings* to compel the debtor to *discover and surrender his estate*;

W. C.

1°. The *Form and Tenor* of the writ of *Fieri Facias*.

The writ, as we have seen, is a precept in the name of the commonwealth, bearing *teste* by the clerk, addressed to the sheriff of any county, or the sergeant of any cor-

poration in the State, commanding him to *cause to be made* out of the *goods and chattels* of the defendant the amount of the judgment, and to have the same *at the return-day* of the writ, to render to the plaintiff, and to have then there the writ also. (V. C. 1873, c. 193, § 27 & seq.)

It runs as follows:

The Commonwealth of Virginia,

To the sheriff of A. county, greeting:

We command you, that of the goods and chattels of David Debtor, late in your bailiwick, you cause to be made the sum of — dollars, with interest thereon, to be computed after the rate of —, per centum per annum, from the — day of —, in the year of our Lord, eighteen hundred and seventy —, till payment, which Charles Creditor, lately in your circuit court for A. county, hath recovered against the said David Debtor, as well for a certain debt as for interest thereon; also — dollars, which to the said Charles Creditor in the same court were adjudged for his costs by him about his suit in that behalf expended, whereof the said David Debtor is convict, as appears of record. And how you shall have executed this writ, make known at the clerk's office of our said circuit court, at the rules to be holden for our said court, on the first Monday in — next. And have then there this writ. Witness B. T., the clerk of our said circuit court, at the courthouse, this — day of —, in the year of our Lord eighteen hundred and seventy —, and in the — year of our foundation.

Teste,

B. T., Clerk.

See Rob. Forms, 340.

2^d. *Whose Property* may be taken under a Writ of *Fieri Facias*.

This point, like most others arising under this and other writs, may generally be determined by the tenor of the writ itself. The sheriff, or other officer, is commanded to cause the debt *to be made* out of the goods and chattels of the *defendant* or *defendants*, if there be several.

The property to be taken, therefore, is the property of the *defendants, or of either of them*. And if, in the exercise of his own discretion, or by direction of the plaintiff, or his attorney, the sheriff levies altogether on the chattels of one of several defendants, that defendant may have contribution from as many of his co-defendants as are not his own sureties for the debt, that is, *in case of contract*. In an action *for a tort* there is no contribution.

The writ commands the officer to take the *defendant's* goods. Hence, if he takes goods which are *not* the defendant's, he is a trespasser, and the ownership of the third person to whom they belong is not divested, either by the levy or by the sale. Various remedies are open to a third person whose property is thus illegally seized, which it will be well to consider *seriatim*.

(1), The claimant of the property may sue the *sheriff for the trespass*, and may also sue the *creditor*, if the levy was made by his direction.

In this action he would recover such damages as a jury should think he had sustained, including the value of the property, unless it had been returned safe and uninjured.

(2), The claimant may sue the *creditor for money had and received* to his (the claimant's) use, as soon as the property is sold, and the *proceeds are paid to the creditor*.

If the property is the claimant's, of course the money which it brings is his, if he chooses to acquiesce in the sale, and the creditor having received the *claimant's money* is liable to him therefor.

(3), The claimant of the property may sue the *purchaser thereof* at the sheriff's sale, either in *detinue* or in *trover and conversion*.

As the sheriff's levy and sale do not divest, nor in any manner affect, the claimant's title, he has a right to treat the purchaser as being illegally in possession of his goods. If he desires to recover the goods specifically, and damages for the detention, he would resort to the action of *detinue*; if he is content to recover their money-value, he would sue in *trover and conversion*.

(4), Supposing the chattels to possess a *pretium affectionis*, a value derived from *sentiment* beyond any actual price which an indifferent person would attach to them, so that *damages* would not compensate for their loss, the claimant may obtain from a court of chancery a writ or order of *injunction* prohibiting the sale, and ordering the property to be restored to the claimant, upon his giving bond with security to pay any damages arising to the creditor from thus interfering with his process, in case the injunction should be dissolved. The court of equity then proceeds to hear and determine the cause, dissolving the injunction if the plaintiff does not make out his title satisfactorily, and perpetuating it if he does. If the injunction is dissolved, the claimant must pay the creditor the amount of his execution and costs, (that being the usual measure of the damage sustained by the creditor,) and if he does not, he will be liable to an action therefor upon his injunction bond. (2 Rob. Prac. (1st ed.) 224, & seq., 237, & seq.)

(5), The claimant may avail himself, in Virginia, of the statutory remedy of *interpleader*, (V. C. 1873, c. 149, § 2 & seq.) which, it will be remembered, is a substitute for the action of *replevin* at common law, and somewhat modelled after it, although the *name* is derived from a proceeding well known for ages to the court of chancery,

and recognized with us by the first section of the same chapter. (V. C. 1873, c. 149, § 1.)

This statutory interpleader may be prosecuted by the claimant, the creditor, or the sheriff, when any controversy as to the ownership of goods on which an execution is, or is proposed to be levied, arises.

When the *claimant* resorts to it, he must first execute, with good security, a bond called a *suspending bond*, (V. C. 1873, c. 149, § 6,) in a penalty double the value of the property, payable to the officer levying the execution, and conditioned to pay the damages sustained by any one by the *suspending of the sale*, until the claim can be adjusted; and thereupon the circuit court, or the court of the county or corporation in which the property is taken, or the circuit judge in vacation, may cause the *creditor and claimant* to appear, and by means of a jury, or if a jury be waived by the parties, by its own act shall ascertain whose the property is, and give judgment accordingly. (V. C. 1873, c. 149, § 1, 2.) See *Ante*, p. 352 & seq.

Where the claimant desires the property to remain in the possession whence the officer took it, he may execute a *delivery-bond*, (supposing the case to be one where a delivery-bond is allowed by law, according to V. C. 1873, c. 185, § 6), with good security, payable to the creditor, conditioned to have the property forthcoming when and where the court shall order, (V. C. 1873, c. 149, § 7); after which the property remains where it was before, but *at the risk of the claimant*. (Id. § 7.)

A corresponding remedy is also given by another statute, to be prosecuted before a *justice of the peace*, when a dispute arises about the title to property levied on under an execution from a justice. (V. C. 1873, c. 147, § 14.) See *Ante*, p. 352.

(6), The claimant may depend upon an *indemnifying bond*, which the officer has by our statutes a right to demand whenever the title is disputed. (V. C. 1873, c. 149, § 4 to 6.)

The indemnifying bond is in a penalty equal to double the value of the property, payable to the officer, (the principal, not the deputy), with good security, conditioned as follows, viz:

- 1, To *indemnify the officer* against all damages which he may sustain in consequence of the seizure or sale of the property;

- 2, To *pay to any claimant* of such property, *all damages* which he may sustain in consequence of such seizure or sale; and

3, To *warrant and defend to any purchaser* of the property such estate or interest therein as is sold.

If the bond be not given in a reasonable time after notice that it is demanded, the officer may refuse to levy or sell, or may restore the property to the person from whom it was taken, as the case may be. If it be given, it is to be returned, within twenty days, to the clerk's office whence the execution issued, and thenceforward the claimant is barred of any action against the officer, provided the security in the bond were good at the time of taking it. (V. C. 1873, c. 149, § 5.)

The bond may be sued on in the name of the officer, for the benefit of the creditor, claimant, purchaser, or other person injured, and such damages recovered in such suit as a jury may assess. And the suit may be in the name of such officer when he is dead, in like manner as if he were alive. (V. C. 1873, 149, § 6.)

To return once more to the execution. As it is to be levied only on the *defendant's goods*, a legacy or distributee's share, to which the personal representative has *assented*, (which assent vests the title in the legatee or distributee), cannot be taken upon an execution against the *goods of the decedent* in the representative's hands to be administered, because such property is no longer part of decedent's estate, but belongs, as has been explained, to the legatee or distributee. The creditor's recourse in such a case is by an action against the executor or administrator, upon his official bond.

In like manner the *separate property* of a married woman is not liable to execution against the *husband's goods*; and property taken in execution and restored upon a delivery-bond, is not liable to be taken again upon another execution, until the delivery-bond has been *forfeited*, until which time it is subject to the former execution. See 2 Tuck. Com. 360.

The execution may sometimes be levied on goods which are not, strictly speaking, the property of the judgment-debtor. One of the most prominent instances is in the case of what are commonly known as *fraudulent loans*. The common law allowed no period of duration of a loan, however long, to lay the subject of the loan liable for the loanee's debts; but in Virginia, ever since Mr. Jefferson's revisal of our laws enacted in 1785, (12 Hen. Stats, 162), we have had a statute known as the statute of *fraudulent loans, &c.*, which, as it stands at present, enacts in substance, that if a loanee remains in possession of a chattel loaned *for five years*, the absolute property shall be taken to be with the possession, *as to creditors of, and purchasers*

from the loanee, unless the loan be declared *by will, deed, or other writing duly recorded*; and a similar policy is prescribed where any reservation or limitation is pretended to have been made of a use or property, by way of *condition, reversion, remainder or otherwise*, in goods or chattels, the possession whereof shall have remained for five years in another. (V. C. 1873, c. 114, § 3.) It is not necessary under this statute, that the declaration of loan should be coeval with it. If made and registered within the five years, it is equivalent to a resumption of the possession, and suffices. (Beasley v. Owen, 3 H. & M. 449; Pate v. Baker, 8 Leigh, 88; Collins v. Lofftus, 10 Leigh, 10.) Nor does the formal resumption of possession avail, if it be only in the presence of relations, and the chattel be immediately restored to the loanee's possession. (Boyd v. Stainback, 5 Munf. 305.) And when the five years of possession have elapsed, the rights of the loanee's creditors immediately attach, and cannot be obviated by a resumption of possession by the loanor, (Garth v. Barksdale, 5 Munf. 101; Taylor v. Beale, 4 Grat 93; Beale v. Diggs, 6 Grat. 582.) The statute applies, let it be observed, only to *pretended loans*, and does not, therefore, include *mortgages*, where the possession remains with the mortgagor, (Rose v. Burgess, 10 Leigh, 197-'8), nor bailments *for hire*, in good faith, (McKenzie v. Macon, 5 Grat. 379.) Finally, as between the lender and the loanee, the transaction is still *no more than a loan*, (Boyd v. Stainback, 5 Munf. 305); nor will any length of possession give the loanee a title *against the lender*, until it becomes *adverse*, by demand and refusal, or other plain indication, and then five years will bar the lender's claim, (Cross v. Cross, 9 Leigh, 255; Dickinson v. Dickinson, 2 Grat. 493; Taylor v. Beale, 4 Grat. 97-'8; Brent v. Chapman, 5 Cr. 358.)

Another case requiring explanation is where property *on leased premises*, belonging to the tenant, or other persons liable for the rent thereof, is levied on. The landlord in such case is considered to have a paramount claim for whatever rent has accrued, or is to accrue due to him, *not exceeding one year*, for which provision is made in England by statute 8 Anne, c. 14; and with us by a corresponding enactment, which requires the officer, out of the proceeds of the goods, to pay the rent in arrear: and as to what is to *become due*, (not exceeding, with the arrears, a year's rent in the whole), to sell a sufficient portion of the goods on a credit till then, taking from the purchaser bonds with good security, payable to the person entitled to the rent, and delivering such bonds to him. (V. C. 1873, c. 134, § 12.) The statute seems to

be applicable only where the goods, at the time of the levy, are "*on premises* leased or rented," so that, although they may have been removed therefrom less than thirty days, and are therefore liable to be distrained by the landlord, the latter's interests are not protected against the execution. (*Geiger v. Harman*, 3 Grat. 131.) The sheriff is not bound to find out the landlord, but the landlord must notify him that the rent is to be provided for before the removal of the goods, or rather before the sheriff parts with the goods or their proceeds; and if the sheriff have knowledge that rent is, or will be due, it is the same thing as if an express notice had been given by the landlord. (*Bac. Abr. Rent*, (K), 8; *Smith v. Russell*, 3 Taunt. 400; *Arnitt v. Garnett*, 3 B. & Ald. (5 E. C. L.) 440.) And should the officer disregard his legal obligations in this particular, he is liable, not necessarily for one year's rent, but for the value of the goods removed from the leased premises, not exceeding one year's rent. (*Henchett v. Kimpson*, 2 Wils. 140; *Crawford v. Jarrett*, 2 Leigh, 638.)

An execution against one of several co-partners may be levied upon the partnership effects; but only the co-partner's undivided interest therein can be sold, and the purchaser becomes tenant in common with the other partner or partners, realizing nothing from his purchase until the partnership debts are all paid. (*Heydon v. Heydon*, 1 Salk. 392; *Jacky v. Butler*, 2 Lord Raym. 871; *Fox v. Hansbury*, Cowp. 449; *Eddie v. Davidson*, 2 Dougl. 650; *Shaver v. White*, 6 Munf. 113.)

If the debtor's property has been conveyed with intent to *delay, hinder, and defraud creditors, &c.*, the conveyance is *voidable*, at the instance of the creditors (V. C. 1873, c. 114, § 1, 2); and the creditor electing to avoid it, may cause his execution to be levied upon the property without regard to the conveyance; and if the fraudulent intent be capable of *clear proof*, it is usually expedient to adopt that course, but otherwise, it is generally most prudent to file a bill in chancery alleging the fraud, and the obstructions it presents to the creditor's recovery of his just debt, and praying that the conveyance may be set aside. (See 2 Tuck. Com. 383 & seq; 2 Rob. Pr. (1st. ed.) 15; *Lang v. Lee*, 3 Rand. 410; *Wilson v. Buchanan*, 7 Grat. 334; *Snoddy v. Haskins*, 12 Grat. 363; *Addington v. Ethridge*, 12 Grat. 400; *Marks v. Hill*, 15 Grat. 430; *Pratt v. Cox*, 22 Grat. 337; *Russell v. Randolph*, 26 Grat. 713, *Perry v. Shenandoah Nat'l Bank*, 27 Grat. 757-'8.)

On the other hand, it should be particularly observed,

that if the *deed of trust* is not avoided by any fraud or illegality, no surplus which may be likely to remain to the debtor, after satisfying the object of the trust can be reached by *fieri facias*, because such an interest is not only a mere *equitable* subject, which of itself would not prevent its being levied on, (V. C. 1873, c. 112, § 16); but because it is *contingent*, and could not be sold under execution without sacrifice. It must be subjected *in equity*. (Clayton v. Anthony, 6 Rand. 285; Coutts v. Walker, 2 Leigh, 280.)

And so, upon a like principle, where a third person recovers a chattel of the executor of a decedent, the creditors of the decedent cannot levy their executions thereon, *notwithstanding in equity* the chattel is liable to their debts, under the statute of fraudulent loans, V. C. 1873, c. 114, § 3; (Taylor v. Beale, 4 Grat. 93.)

Neither is an unascertained interest in a decedent's estate capable of being levied on and sold under an execution; and if sold, the sale would be avoided inequity, and the purchaser be obliged to account for the profits; with a credit for what he had paid. (Penn v. Spencer, 17 Grat. 85.)

3^d. What kind of Property may be Taken under a Writ of *Fieri Facias*.

This also is determined by the phraseology of the writ. It commands the officer to make the money out of the *goods and chattels* of the defendant (V. C. 1873, c. 183, § 27.) It may, therefore, at common law, be levied upon *everything*, not a mere *chose in action*, *that is a chattel*, except necessary wearing apparel, whether such chattel be real or personal, as leases for years, cattle, corn, household stuff, &c. So it may be levied *on money* of the defendant, being in his possession, (Dalt. Sh'ff, 145; Bac. Abr. Ex'on, (C), 4; Turner v. Fendall, 1 Grat. 117; Handy v. Dobbin, 12 Johns. (N. Y.) 220; Holmes v. Nuncaster, 12 Johns, 395); and although it is said (Bac. Abr. Ex'on (C), 4), that bank notes cannot be taken because they are *choses in action*, yet upon principle it seems at this day to be otherwise, since they are transferable by *delivery* (Ibid); and in Virginia, all doubt, if there were any, is removed by the statute itself, which allows them to be levied on, and declares that if the creditor will not take them at their nominal value, they *shall be sold* like other property; whilst gold and silver coin taken is to be accounted for at *par value*, as so much money. (V. C. 1873, c. 183, § 27, 28.)

It has been doubted whether, at common law, the crops growing and unsevered on *freehold lands* are liable to be

taken, being not properly chattels, but part of the freehold to which they are annexed. The later English cases seem to establish that, at common law, these crops which, *being the fruits of annual industry*, would pass to an executor as *emblems* may be levied on, (2 Tidd's Pract. 1001; Peacock v. Purvis, 2 Bro. & Bingh. (6 E. C. L.) 362; Evans v. Roberts, 5 B. & Cr. (12 E. C. L.) 829); and this is the doctrine in *Massachusetts*, (Penhallow v. Dwight, 7 Mass. 34); in *New York*, (Whipple v. Fort, 2 Johns. 14; Hartwell v. Bisswell, 17 Johns. 128); and in *Kentucky*, (Parham v. Thompson, 2 J. J. Marshall, 159; Thompson v. Craignegle, 4 B. Monr. 391.)

This doubt, however, if it be a doubt, is set at rest in Virginia by statute, declaring that no growing crops of any kind (not severed) shall be liable to distress or levy, except *Indian corn*, which may be taken at any time after the 15th day of October in any year. (V. C. 1873, c. 149, § 32.)

In Virginia certain articles of supposed or actual domestic necessity have been exempted from levy or distress, in favor of a husband, parent, or other person who is a *housekeeper and head of a family*. From the enumeration presently to be made of the articles exempt, it will be obvious that this statute, in conjunction with the *homestead law*, renders it practically impossible to compel an immense proportion of the people of the commonwealth, probably hardly less than *five-sixths*, to pay any debt.

The tendency of such a policy is to impair, if not destroy, the *credit* of that proportion of the population, doubtless in the aggregate to the serious inconvenience and detriment of the industrious and thrifty portion of the *protected class*; to cripple and retard the general industrial progress of society, of which a necessary condition is a free alienation of property, and the rigorous enforcement of contracts; and saddest of all, to engender a recklessness of pecuniary obligation, and a general decline of the sense of right and wrong between man and man.

This is what is known as the "*poor man's law*!"

The articles exempted by it are the following, viz:

First, The family Bible!

Second, Family pictures, school-books, and library for the use of the family, not exceeding \$100 in value!

Third, A seat or pew in any house or place of public worship!

Fourth, A lot in any burial ground!

Fifth, All necessary wearing apparel of the debtor and his family. All beds, bedsteads, and bedding necessary

for the use of such family. All stoves and appendages put up and kept for the use of the family, not to exceed *three*.

Sixth, One cow, one horse, six chairs, one table, six knives, six forks, six plates, one dozen spoons, two dishes, two basins, one pot, one oven, six pieces of wood or earthenware, one loom and its appurtenances, one safe or press, one spinning-wheel, one pair of cards, one axe, two hoes, five barrels of corn, five bushels of wheat, or one barrel of flour, too hundred pounds of bacon or pork, three hogs, ten dollars in value of forage or hay, one cooking-stove, and utensils for cooking therewith, one sewing machine: and in case of a mechanic, the tools and utensils of his trade, *not exceeding one hundred dollars in value*.

Seventh, If the debtor be at the time actually engaged in the business of agriculture, while he is so engaged, one yoke of oxen, or a pair of horses or mules in lieu thereof, with the necessary gearing, one wagon or cart, two ploughs, one drag, one harvest-cradle, one pitch-pork, one rake, two iron wedges.

All of which articles intended to be exempt shall be chosen by the head of the family, &c. (V. C. 1873, c. 49, § 33, 34.)

Choses in action are not in general liable to the execution of *fieri facias*, unless perhaps, in the case of *negotiable securities* in a state to be *transferred by delivery*. Hence, debts due by bond, by promissory note not negotiable, by open account, &c., although subject, as we shall presently see, to the *lien of a fi. fa.* cannot be taken under it; not even a debt due to the debtor from the sheriff himself, unless at his (the sheriff's) own option. If he chooses to regard money due from him to the defendant as so much in his hands applicable to the execution, he will by his return to that effect charge himself with it, and may *perhaps* charge the sureties in his official bond likewise. But if the sheriff has in his hands, *as sheriff*, money belonging to the defendant, he ought to bring it into court, and leave the court to direct the application. (2 Tuck. Com. 360-'61; Steele v. Brown, 2 Va. Cas. 24; Norris v. Crummey, 2 Rand. 330 & seq.) In England a different doctrine prevails, upon the singular ground that *money cannot be taken in execution!* (2 Tidd's Pract. 1003; Fieldhouse v. Craft, 4 East. 510; Knight v. Criddle, 9 East. 48; Padfield v. Brine, 3 Bro. & B. (7 E. C. L.) 294. See also Williams v. Rogers, 5 Johns. (N. Y.) 163.)

At common law no interest *merely equitable* is subject to be seized under a *fieri facias*, because that is the pro-

cess of a common law court, and the common law courts do not recognize equitable interests. But our statutes in Virginia, after the example of those in England, have provided that estates of every kind, holden or possessed *in trust*, shall be subject to debts and charges of the persons to whose use, or to whose benefit they are holden or possessed, as they would be if those persons owned the like interest in the things holden or possessed, as in the uses or trusts thereof. (V. C. 1873, c. 112, § 16.)

But it must be observed that, notwithstanding the comprehensiveness of this provision, it does not extend to permit a *fi. facias* to be levied upon an equitable interest *unascertained* in amount, because such interest could not, without sacrifice, be sold under execution. Of this character is an *equity of redemption* in a mortgage or deed of trust, which can only be subjected to debts, like other property of similar description, by a bill in equity. (Claytor v. Anthony, 6 Rand. 285; Coutts v. Walker, 2 Leigh, 280.)

And for a like reason no unascertained interest of the debtor can be sold by the sheriff under execution, but by bill in equity, or otherwise, the incumbrances and obscurities must be cleared away before a sale can be properly made. And if a sale is made by the sheriff, in disregard of these principles, it will be set aside, and the purchaser be made to account for the hires and profits of the property, supposing him to have been in possession, and for the value of such as he has sold or otherwise converted to his own use, or lost by his act or wilful default, whilst he will be entitled to be reimbursed the amount he paid for the property. (Clough v. Thompson, 7 Grat. 33; Penn v. Spencer, 17 Grat. 94.)

Under a *fi. fa.* no freehold, nor thing affixed *permanently* to the freehold as part thereof, can be taken, the writ applying only to "*goods and chattels*." (2 Tidd's Pract. 1002.) To this subject, therefore, belongs the consideration of the doctrine of *fixtures*.

The term *fixtures* is bestowed on such articles as in their own nature are *personal chattels*, and are fixed or fastened to the freehold, but not as accessories *necessary to the completeness or enjoyment of it*, and are fixed in such a manner as to be removable without material injury to, or tearing of, the freehold. To constitute a fixture, therefore, the following circumstances must concur, viz:

1. The thing must be in its nature *a chattel*;
2. It must be *fixed to the freehold*;
3. It must be *so fixed* that it may be detached *without injury to, or tearing of*, the freehold;

4, It must not be necessary to the *completeness and enjoyment of the freehold*.

If the article be *not in any manner fixed to the freehold*, no question can usually arise. It is removable, of course, however bulky, and may be levied on *as a chattel*, under an execution of *fi. fa.* To this principle there are, however, some exceptions, as where the thing is an essential part of the freehold, and is only temporarily severed from it, as for example, a mill-stone taken out to be picked, or window-blinds or sashes removed to be painted, &c. in which case the chattel continues, in view of the law, to be a part of the freehold, and is incapable of being taken in execution.

If the chattel, being fixed to the freehold, be either an essential adjunct to its enjoyment, (as is generally the case with *agricultural appliances*), or if it cannot be severed without material injury thereto, in either case it constitutes a part of the freehold, and a *fi. fa.* cannot be levied upon it. (*Green v. Phillips*, 26 Grat. 752, 762.)

Thus far, in the abstract, the principles seem to be clear enough; but practically no inconsiderable difficulty grows out of the different degrees of removability of fixtures, as between different classes of persons. Thus in the *interests of trade*, the greatest degree of removability exists as between *lessor and lessee for years*. For a like reason, a somewhat less but still a very large degree of removability exists as between reversioner or remainderman, and executor or administrator of *tenant for life*. And the least degree of removability exists as between *heir and executor of decedent*.

See 2 Insts. Com. & Stat. Law, 533 & seq.

An execution of *fi. fa.* against a tenant for years may be levied, it is believed, upon any fixture annexed by the tenant, which, as against the landlord, he might remove during his term, and so in the other two cases. In the case of a tenant in fee simple, those fixtures only are liable to execution of *fi. fa.* which are removable as between *heir and executor*. When they are thus removable is explained in 1 Lom. Ex'ors, &c., 256, &c.

See *Winn v. Ingilby*, 5 B. & Ald. (7 E. C. L.) 625; 2 Smith's L. C. 194 & seq; *Horn v. Baker*, (9 East, 215); 2 Smith's L. C. 219 & seq; *Green v. Phillips*, 26 Grat. 762; *Elwes v. Mawe*, (3 East. 38); 2 Steph. Com. 260; 2 Kent's Com. 345; 2 Insts. Com. & Stat. Law, 535 & seq; *Id.* 540 & seq.

Whilst in general, *no freehold interest* is subject to be taken upon an execution of *fi. fa.*, it must be remembered that, at the *suit of the commonwealth*, lands are liable to

be levied on and sold under it, (V. C. 1873, c. 40, § 8), the precept of the writ in such case being, "We command you that of the goods, chattels *and real estate* of D. D. you cause to be made," &c.

We find then, that a *feri facias* cannot in general be levied on *choses in action*; on *unascertained* equitable interests, like equities of redemption, or on *freehold estates*; but it must not, therefore, be supposed that those interests are incapable of being reached by *any process*, and are exempt from debts altogether.

Choses in action and *uncertain* equitable interests may be subjected in a manner presently to be explained, and *freehold estates* in the ordinary state of the law, by writ of *elegit*; but that writ being *at present* abolished in Virginia, recourse must be had to a *court of equity*, (V. C. 1873, c. 183, § 26; Id. 182, § 9), whose aid may be invoked, under proper circumstances, in the first two cases likewise.

4^f. Manner in which Chattels may be levied on under a Writ of *Fieri Facias*.

It is not needful that the officer should *lay his hand* upon each individual article in order to constitute a sufficient levy. It is enough if, having the goods *in his power and view*, he declares that he seizes them to satisfy the execution. (2 Tuck. Com. 67; 2 Tidd's Pract. 1013; Bullitt v. Winston, 1 Munf. 278, 283; Cole v. Davies, 1 Ld. Raym. 725.) But it is no levy, unless the goods be *in his power*, although they may be *in his view*. Thus, where the sheriff *saw* the property, which was locked up in a log-house, but armed men threatened him with violence if he meddled with it, whereupon he declared that he levied upon it, and then went to summon the *posse comitatus* to overcome the threatened resistance, but upon his return found that the property had been removed he knew not whither, it was held to be *no levy*, because he had it not *in his power*. (Wadsworth, &c. v. Miller, &c., 4 Grat. 101.)

To offer any resistance to an officer of the law in the discharge of his duty is a very grave offence against public justice, which, besides being punishable as a contempt of the court which issued the process, (V. C. 1873, c. 190, § 27 (cl. 4); Wells' Case, 21 Grat. 500, 504; Balt. & O. R. R. Co. v. Wheeling, 13 Grat. 40), subjects the offender also to fine and imprisonment, at the discretion of a jury, (V. C. 1873, c. 19, § 30.) The officer, moreover, is authorized and required, when the resistance is anticipated, to summon the *power of the county* (*posse comitatus*), to aid him in executing any *process, order, or warrant* directed

to him, (V. C. 1873, c. 49, § 24; See Bac. Abr. Ex'on-
(O).)

In levying the execution, as in other cases of *civil process*, it is not allowable to break open the *outer door* of the defendant's *dwelling* (as it is by statute in the case of *distress*, (V. C. 1873, c. 134, § 13); but the officer may break open *inner-doors* or chests, or the outer-doors of *out-houses*, or even of a *stranger's dwelling*, if the defendant's goods are *therein*, but this is at his peril if the defendant's goods be not found there. (2 Tuck. Com. 362; Bac. Abr. Ex'on, (N); 2 Tidd's Pr. 1011, 1012.)

The defendant's property is not protected from the levy of an execution (as it is in the case of *distress*) by being *in his actual use*, as a horse which he is riding, &c.; but the sheriff may seize the horse and then dispossess the defendant, using as little violence as possible for the purpose. (2 Tuck. Com. 362.)

Unreasonable levies are expressly prohibited, (V. C. 1873, c. 49, § 35); and it is improper for the sheriff to sell more of the property than is necessary to satisfy the execution, if a part can be detached without material prejudice, and sold separately. (2 Tuck. Com. 362.)

5^t. When the writ of *Fieri Facias* may be Levied.

The writ cannot be levied, of course, before it is issued, nor after the return-day. But if *levied* before the return-day, the lapse of that day does not arrest the proceedings; but the officer may go on to sell the property, and may receive the money from the debtor afterwards, for an execution is an *entire thing*; and, upon the same principle, if it be issued before the party's death, although it be not in the officer's hands, it may be levied after his death. (Bac. Abr. Ex'on, (C) 4; 2 Tuck. Com. 341, 360; 1 Rob. Pr. (1st ed.) 520 & seq; Bragner v. Langmead, 7 T. R. 22-'3; Eaton v. Southby, Willes. 135 & n (b); Wheaton v. Sexton, 4 Wheat. 503; Dix v. Evans, 3 Munf. 308; Ballard v. Whitlock, 18 Grat. 238; Chapman v. Harrison, 4 Rand. 336.)

Neither an execution, nor any other *civil process* can be served *on Sunday*, except in cases of persons escaping out of custody, or where it is especially provided by law, as in attachments against absconding debtors, (V. C. 1873, c. 49, § 25; Id. c. 148, § 10.) An execution may be levied *by night* as well as by day, which is not admissible in a warrant of *distress*, except by statute in case of goods fraudulently removed from the leased premises, (V. C. 1873, c. 134, § 13.)

Members of the general assembly were long privileged from execution, even against their goods, during their at-

tendance thereon, and for one day before and after, for every twenty miles of necessary travel to and from their homes; but at present, they are exempt only from being "taken into custody or imprisoned, under any process, except for treason, felony, perjury, breach of the peace, or for any contempt of court which is of a criminal nature, and not merely a disobedience of civil process." (V. C. 1873, c. 14, § 5 to 7). But whilst the privilege subsisted, if the levy were made before it attached, it was the duty of the officer not to restore the property, but to keep it safely during the continuance of the privilege. (2 Tuck. Com. 362). And it is also enacted, that "any action, suit, or other civil proceedings, either in favor of or against a member of the general assembly, may be commenced, but shall not, unless by his consent, be prosecuted to *final judgment or decree* during his attendance upon the general assembly. But his person shall not be taken into custody or imprisoned," that is, on such civil process. (V. C. 1873, c. 14, § 4.)

6^t. The *Lien of a Fieri Facias*.

At common law, an execution of *feri facias* had relation to its date, in respect to the *lien* which it created, so that if, after it was *issued*, the defendant had sold the goods, though *bona fide* and for valuable consideration, to one without notice, yet still they were liable to be taken. But this being attended with much inconvenience to trade, the statute of frauds, 29 Car. II, c. 3, enacted that no writ of execution should bind the property of goods, (that is, as against subsequent *bona fide purchasers for value*,) but from the time when it should be *delivered to the proper officer to be executed*. (Bac. Abr. Ex'on, (I).) A corresponding provision of long standing has existed in our Code, and by the revision of 1849, the qualification was extended to *creditors* also, it being declared that, as against *subsequent purchasers* for valuable consideration, without notice, and creditors, the writ shall bind what *it may be levied on*,—namely: goods and chattels, current money and bank-notes,—only from the time that the writ is *delivered to the officer to be executed*. (V. C. 1873, c. 183, § 27.) This lien is conditional, and depends on the execution being afterwards levied before the return-day thereof is past. If not so levied, the lien is then at an end; but if levied, all intermediate *levies of junior executions*, and all intermediate *gifts, and even sales for value* of such tangible chattels, whether such sales or gifts be with or without notice, are avoided in favor of the first execution creditor; and this lien continues until the authority to sell under the execution expires. (2 Tuck. Com. 363; Evans v.

Greenhow, 15 Grat. 161; Carr v. Glasscock, 3 Grat. 354; Humphrey v. Hitt, 6 Grat. 527). And it should be observed, that whilst the English statute, and our own former statute, provided only for the relief of *purchasers* for value after the date of the writ, and before it came to the officer's hands to be executed, and not for *creditors* who should, during that interval, sue out execution and cause it to be levied, yet, our present statute, as already stated, extends its protection to *creditors* as well as purchasers, which must mean *execution-creditors*. If, therefore, after the issue of the first execution, but before it goes into an officer's hands to be executed, a second execution issues, and goes into the officer's hands before the first, it is entitled to priority over the first. But it is apprehended that after an execution is placed in the officer's hands to be executed, no preference can be acquired over it by the prior levy of a subsequent execution, at least in the hands of the same officer, supposing the lien of the first execution to be consummated by an actual levy before the lapse of the return-day. To be sure, if the sheriff sell under the second execution, the title of the purchaser is not divested in favor of the creditor in the first execution, but the latter has a remedy over against the sheriff. (Smallcomb v. Cross, 1 Lord Raym. 252; Hutchinson v. Johnson, 1 T. R. 731; Payne v. Drewe, 4 East. 523; McKey v. Garth, 2 Rob. 38.)

But the revisal of 1849 affords another lien considerably more extensive, extending not only to such property as the law permits the writ of *feri facias* to be levied on, (which is as far as the common law carries it, and as far as it was carried by our statute prior to the revisal), but to *all the personal estate* of, or to which the judgment-debtor is possessed or entitled, (although *not levied on*, nor capable of being levied on under V. C. 1873, c. 183, § 27 & seq, except, (1), Chattels exempt by the "*poor man's law*" in favor of *husbands and parents* who are *heads of families*, (V. C. 1873, c. 49, § 33-4); (2), *Wages due to a laboring man, and not over fifty dollars a month*; (3), Chattels included in the *homestead exemption*, (V. C. 1873, c. 183, § 1); and except also, (4), That as to an *assignee for value* of property not levied on, nor capable of being levied on, and as to a person *making a payment* to a judgment-debtor, such lien shall exist only from the time the *assignee, &c., had notice thereof*. (V. C. 1873, c. 184, § 3; Evans, Trustee, v. Greenhow, &c., 15 Grat. 153; Charron v. Boswell, 18 Grat. 216.)

In order to make these liens of a *feri facias* available, and to mark their commencement with precision, the

officer is required, (under a penalty to be assessed by the court in favor of the creditor, not exceeding *fifteen per centum* upon the amount of the execution), to endorse on the *fi. fa.*, the *year, month, day, and even time of day* he receives it, (V. C. 1873, c. 183, § 29); and if several writs are in his hands, they are to be satisfied in the order in which *they were delivered*; and if delivered at the same time, they are to be *satisfied pari passu*. (V. C. 1873, c. 183, § 30.)

The lien of the *feri facias*, last mentioned, continues after the return-day, and, by the terms of the statute, is terminated only by the right ceasing to levy that or a new execution, or by the same being suspended in any way, as by a forthcoming bond given and *forfeited*, or by a *supersedeas* or other legal process. (V. C. 1873, c. 184, § 4; *Puryear v. Taylor*, 12 Grat. 401; *Charron v. Boswell*, 18 Grat. 216.)

It appears, therefore, that by virtue of the ancient lien of the *feri facias*, first above described, as it exists in Virginia, when the execution is *duly levied*, all *intermediate* levies of subsequent executions, and all intermediate *gifts, or even sales for value*, of the personal chattels taken in execution, whether such sales or gifts be with or without notice, are liable to be avoided, (2 Tuck. Com. 363; *Evans v. Greenhow*, 15 Grat. 161); but the lien is still subject to the exceptions above enumerated, as (1), (2), and (3); whilst as to chattels not levied on, *nor capable of being levied on*, the last described lien then which becomes applicable, is subject not only to those exceptions, but also to the fourth exception, above stated likewise. (*Evans, Trustee, v. Greenhow & als*, 15 Grat. 160; *Charron v. Boswell*, 18 Grat. 221 & seq.)

Any conflict of liens between execution-creditors, or between creditors by execution, and by attachment, may be adjusted by petition to the court, the force of whose process is in question, or more satisfactorily by a proceeding in chancery, to which all the persons concerned ought to be made parties. (*Charron v. Boswell*, 18 Grat. 220; *Erskine v. Staley*, 12 Leigh, 406; *Moore v. Holt*, 10 Grat. 284.)

It is proper to observe, that the levy of an execution of *feri facias* does not divest the defendant in the execution of the *property*, and transfer it to the sheriff. It is in the custody of the law, and the sheriff has a *special interest* vested in him as *mere bailee*, to keep it safely, and with a naked power to sell it, and pass the title of the owner to the purchaser. (*Walker v. Commonwealth*, 18 Grat. 13.)

An execution delivered to the officer to be executed does not, as we have seen, complete the lien of the kind first above described under V. C. 1873, c. 183, § 27, but there must be an *actual levy* in order to consummate it. And so imperfect is it without such levy, that a creditor may withdraw his execution against his principal debtor from the hands of the officer without impairing the liability of a surety for the debt. (*Humphrey v. Hilt*, 6 Grat. 509; *Charron v. Boswell*, 18 Grat. 225.) But where the writ has been once levied, the plaintiff must employ great caution in directing or allowing the property to be discharged, lest he lose the lien he has acquired. He may sometimes lose thereby the right to sue out a new execution, even against a single defendant, and much more where there are several defendants, one or more of whom are *sureties*. With consent of *all parties* the plaintiff may always abandon his levy, and issue a new execution, or as between principal and surety, when the levy is on the property of the *surety*, he may do so. So also if the levy be abandoned *by the sheriff with consent of all the defendants*, but without the concurrence of the plaintiff, or if the property be *eloigned* or removed by *defendants* out of reach of the sheriff, without consent of the sheriff or plaintiff, or if by a misunderstanding of the plaintiff's directions on the part of the sheriff, and of the defendants, the property levied on is released by the sheriff to them, in all these cases the plaintiff may have a new execution. But if the property be lost to *defendant* by the misconduct or neglect of the sheriff, the execution is thereby satisfied to the extent of the *value of the property*, and the plaintiff can look only to the sheriff for indemnity. (*Walker v. Commonwealth*, 18 Grat. 13.)

7^c. Forthcoming or Delivery Bond.

When property is taken under execution the law indulges the debtor with the privilege of keeping it in his own possession, and *at his risk*, until the day of sale, provided he will execute a bond, with sufficient security, (*usually in a penalty double the amount due thereon*, but more properly double *the value of the property*,) payable to the creditor, and conditioned to have the goods *forthcoming* at the time and place appointed by the officer for the sale. This, which is styled a *forthcoming or delivery bond*, is delivered to the officer, who thereupon, if he is satisfied with its sufficiency, surrenders the effects to the debtor again. The condition recites the service of the process, and the amount due thereon, (including lawful charges and costs,) and any variance from the process is fatal. (V. C. 1873, c. 185, § 1; *Glasscock v. Dawson*,

1 Munf. 605 ; Meze v. Howver, 1 Leigh, 442 ; Crouch v. Miller, 2 Leigh, 545.)

The condition, supposing the obligation not to be saved before forfeiture, by *injunction* or *supersedeas*, (Wilson v. Stevenson, 1 Call. 213 ; Rucker v. Harrison, 6 Munf. 181), must be *precisely and literally complied with*, or else the bond is forfeited. However trivial may be the value of the article which the defendant fails to have forthcoming at the time appointed for the sale, this forfeiture follows: obliging the parties to the bond to pay the whole amount of the judgment, (not exceeding the penalty of the bond,) or at least as much as may remain unpaid after crediting the proceeds of the chattels which may have been then delivered. (Pleasants v. Lewis, 1 Wase. 173 ; Bernard v. Scott, 3 Rand. 522.) Nor is the plaintiff bound to show a breach of this condition ; but the defendant must prove performance thereof. (Nicholas v. Fletcher, 1 Wash. 330.)

In case of such forfeiture of the delivery-bond, if the amount be not paid, including all lawful charges, the officer, *within thirty days* thereafter, shall return it, with the process to the proper court or clerk's office, (V. C. 1874, c. 49, § 27), when the clerk endorses the date of its return, and as against the obligors *who are alive* when so returned, it has the *force of a judgment*, but not so as to warrant an execution thereon without an order of court. (V. C. 1873, c. 185, § 2.) And if the bond be not returned before, this lien subsists from the time of making the motion. (Jones v. Myrick, 8 Grat. 179.)

The obligors in the bond are liable for the money therein mentioned, with interest from its date, and costs, to be recovered by action or motion, (V. C. 1873, c. 185, § 3,) on *ten days' notice* in general, which is the time in all motions, if no other time be specified. (V. C. 1873, c. 163, § 4.) But by Acts of 1869-'70, (p. 163, c. 120, § 5), it is provided, that where the original debt was incurred previous to April 10, 1865, no award of execution can be made on a forfeited forthcoming bond, until after *three months' notice* to the obligors. (V. C. 1873, c. 49, § 43.) But this statute is held not to apply where the bond was forfeited *before the passage* of the act. (Goolshy v. Strother, 21 Grat. 107.)

The award of execution cannot be successfully resisted on account of the invalidity of the original judgment, unless such judgment is wholly *null and void*. However irregular and erroneous it may be, as long as it remains unreversed, it cannot be drawn in question in a collateral proceeding, unless it be *ipso facto* void. (1 Chit.

Pl. 126, 403; *Harvey v. Daniel*, 2 Lev. 161; *Hayward v. Ribbons*, 4 East. 311; *Pates v. St. Clair*, 11 Grat. 33.)

For the terms and effect of delivery-bonds, and the practice in respect to them, see 1 Rob. Pr. (1st ed.) 591 & seq; *Robinson v. Sherman*, 2 Grat. 178; *Leake v. Ferguson*, Id. 419; and the cases referred to in the notes to the above cited passage of the code.

It must be noted, that as to an execution on a forthcoming bond, it is provided, as also in some other enumerated cases, that the clerk shall endorse on the execution that "*no security is to be taken.*" (V. C. 1873, c. 185, § 6, 7.)

A forthcoming bond may be taken by a constable on a *fi. fa.* issued by a justice of the peace; and an award of execution may be made in such case *by a justice*, on motion on ten days' notice. If, however, the amount actually due exceeds twenty dollars, exclusive of interest, the defendant may remove it into a county or corporation court.

For the proceedings, see V. C. 1873, c. 185, § 8 to 14.

8^c. Proceedings after the Levy of a *Fieri Facias*; W. C.

1^s. Providing for the Security of the Property.

It is the officer's duty to provide for the safe-keeping of the property levied on, and if it be animate, for its proper support, taking care, whatever be its character, that it sustains no injury; for the expense attending all of which, he is to be indemnified out of the sale of the property, although such charges, (if the property were casually destroyed, without default of the sheriff), are properly to be defrayed in the first instance, by the plaintiff in the execution. And in no case shall the goods be removed out of the county or corporation, unless where it is otherwise specially provided. (V. C. 1873, c. 49, § 35.)

2^s. Provision to Indemnify the Officer for the Seizure or Sale of Property.

For the ease and security of an officer who levies an execution, it is provided, as we have seen, that if any doubt shall arise whether the property is liable to the levy, he may, as well after the levy as before, demand of the creditor an *indemnifying bond*; and if it be not given (of course with sufficient security), within a reasonable time after notice that it is required, the officer may refuse to levy on the property, or may restore it to the person from whose possession it was taken. (V. C. 1873, c. 149, § 4, 5.) The bond, which may be executed in the partnership name, by one member of a firm, which makes it his bond, (*Davis v. Davis*, 2 Grat. 368), is payable *to the officer*, and is in a penalty double the value of the property, conditioned as follows:

1st, To *indemnify the officer* against all damages which he may sustain in consequence of the seizure or sale of such property;

2nd, To pay *any claimant* of the property all damage which he may sustain in consequence of such seizure or sale; and

3rd, To *warrant and defend to any purchaser* of the property, such estate or interest therein as is sold. (V. C. 1873, c. 149, § 4.)

The bond is to be returned *within twenty days* to the clerk's office from which the execution issued, or if not issued by a clerk, (that is, if it emanate from a *justice of the peace*, Davis v. Davis, 2 Grat. 363), to the office of the court by which the officer was appointed, or in which he qualified, (V. C. 1873, c. 149, § 5); and suit may be prosecuted upon it in the name of the officer, (although he be dead), for the benefit of the claimant, creditor, purchaser, or other persons injured, (who is styled the *relator*, and the suit is said to be *at his relation*), and such damages recovered as a jury may assess. (V. C. 1873, c. 149, § 6.) After the bond is returned to the officer, the claimant, or purchaser of the property is *barred of any action against the officer* levying thereon, provided the security therein be good at the time of taking it, (V. C. 1873, c. 149, § 6; Davis v. Davis, 2 Grat. 363); and supposing also that the bond conforms in its terms to the direction of the statute in the three particulars above enumerated. (McClunn v. Steel, 2 Va. Cas. 256; Aylett v. Roane, 1 Grat. 284.) The sheriff, however, is not bound to avail himself of this defence, but if damages are recovered against him may sue on the bond, and obtain the indemnity stipulated for in it. (Dabney v. Catlett, 12 Leigh, 383; Aylett v. Roane, 1 Grat. 284, &c.)

And it should be observed that, although the bond be not in conformity with the statute, and therefore, not a good statutory bond, it is yet good at common law. (Hewlett v. Chamberlayne, 1 Wash. 367; Johnston v. Merriwether, 3 Call. 523; Crawford v. Jarrett, 2 Leigh, 630; Dabney v. Catlett, 12 Leigh, 383; Aylett v. Roane, 1 Grat. 284-'5.)

When the property, the sale of which is thus indemnified, sells for more than enough to satisfy the execution, the surplus is paid into court, and is to be disposed of by it as the rights of those interested may seem to require. (V. C. 1873, c. 149, § 8.)

At common law the sheriff is exposed to great perplexity when a question arises as to the ownership of

property which the creditor insists belongs to the debtor, and a third person claims as his own. However he shall act, he may be liable to complaint and litigation—by the creditor, if he does not levy, and by the claimant, if he does. There are, indeed, several imperfect expedients to which he may resort, but nothing comparable to the statutory indemnifying bond. Thus:

(1), He may summon a jury to try the right of property in an informal way, and if the verdict be in favor of the *claimant*, he is justified in discharging the chattels from the levy; but the contrary verdict does not, it seems, protect him against the true owner. (1 Bac. Abr. Ex'or, (C) 4; 2 Tuck. Com. 369; 2 Tidd's Pract. 1008.) But see *Latham v. Eames*, & 2 H. Bl. 437; *Glassop v. Cole*, 3 M. & S. 173;

2, The court, it seems, may *direct an issue*, (by virtue of its supervisory power over its own process), to try the right to the property, or may await the adjudication elsewhere, and meantime may retain the money, or probably the property, if capable of being kept without loss of value or material expense, to abide the event. (2 Tidd's Pr. 1008 n (1); *Thurston v. Thurston*, 1 Taunt. 120.)

3, The officer may require—at least may lawfully *take*—from the creditor, if he is willing to give it, a bond to indemnify him for the seizure or sale of the property. (*Crawford v. Jarrett*, 2 Leigh, 630; *Dabney v. Catlett*, 12 Leigh, 383);

4, It has been repeatedly suggested that a *bill of interpleader* would lie in chancery for the officer, to compel the creditor and the claimant to litigate their respective pretensions, (*Cooper, &c. v. Chitty, &c.*, 1 Burr. 37; *Storrs v. Payne*, 4 H. & M. 506; *Baird v. Rice*, 1 Call. 23.) But as it is an established principle that he who files a bill of interpleader *in equity*, must *always* admit a title against himself in one or other of the contending parties, (he himself being a mere stake-holder,) the sheriff in such a case would be obliged to admit himself to be a *wrong-doer*, and, therefore, this remedy does not appear to be open to him, (*Slingsby v. Moulton*, 1 Ves. & B. 334; 2 Stor. Eq. § 821.)

It may have been this suggestion of a bill of interpleader *in equity* to try the right of the property in case of disputed title in connection with the levy of executions, that induced the English parliament, by statute 1 and 2 William IV, c. 58, which the revisors of our Code of 1849 have imitated, to devise new means of instituting and conducting an inquiry into the title, in a mode

designed to be prompt and inexpensive, to which they gave the name of *interpleader*. The common law action of *replevin* was a well-nigh perfect provision for the *claimant* of property wrongfully levied on; but it was not adapted to the occasions of the officer or creditor, both of whom are concerned often, to set on foot a judicial enquiry into the real ownership of property, which they may conceive to be subject to execution. Accordingly, the proceeding of *interpleader* contemplates that it may be resorted to by either the claimant, creditor or sheriff, that is, in case of the *sheriff* supposing that *no indemnifying bond* has been given, for if one has been given, the sheriff has no longer any concern in the title, but *must* proceed to sell, and is protected against all liability therefor. (*Stone v. Pointer*, 5 Munf. 290.) Provision is made for the claimant's obtaining, by means of a suspending bond, a *suspension of the sale*, along with an order of *interpleader*; and he may have also, by means of a delivery bond, the return of the property to the possession whence it was taken.

See V. C. 1873. c. 149, § 2, 3, 6.

The proceeding in a statutory *interpleader* has been already set forth, (*Ante*, p. 350 & seq) but may be recapitulated briefly as follows: Upon the application of the *claimant* of the property levied on under execution, the sale shall be *suspended* on his delivery to the officer of a bond, with good security in a penalty equal to double the value thereof, payable to said officer, conditioned to pay all damages sustained by any one in consequence of the suspension. (V. C. 1873, c. 149, § 6.) And if he desire the property to remain in the possession whence it was taken, and the case be one in which a forthcoming bond *is not prohibited* by V. C. 1873, c. 185, § 6, he may accomplish it by means of such a bond, with the usual recital, and with condition to have the property forthcoming at such a day and place of sale as may be *thereafter lawfully appointed*; on which the proceedings are the same as in other cases of delivery-bonds under V. C. 1873, c. 185, § 2, 3, 5, 6.

Having thus secured the *suspension of the sale*, and if he desires it, *the restoration of the property*, the claimant may then proceed to obtain from the circuit court, or the court of the county or corporation in which the property was taken, or from the judge of the circuit court in vacation, an order to cause to appear *before such court*, as well the creditor who issued the process as the claimant; and such court may cause such issue or issues to be tried as it may prescribe, may direct which party shall

be considered the plaintiff in the issues, and shall give judgment upon the verdict rendered, or if a jury is waived by the parties, shall determine their claims in a summary way. (V. C. 1873, c. 149, § 2, 1.) And when no forthcoming bond is given, the same courts, or the judge of the circuit court in vacation, may, before the decision of the rights of the parties, make an order for the sale of the property, or any part of it, and direct the application of the proceeds. The court may further make all such rules and orders, and enter such judgment as to costs and all other matters as may be just and proper.

The proceeding to try the title may also be instituted *by the officer*, where no indemnifying bond has been given, or *by the creditor*, neither of whom of course is called upon to give a suspending bond, nor has any occasion to give a forthcoming bond; and when instituted it is conducted in the same manner as is above explained. (V. C. 1873, c. 149, § 2, 3.)

See *Ante*, p. 351 & seq; 2 Tidd's Pract. 1008, n (1).

3^a. Sale of Property Levied upon under *Fieri Facias*.

Having provided for the safe-keeping of the property, and supposing no dispute as to title to arise, at least so as to arrest subsequent proceedings, the next step is *to sell the goods and chattels* levied upon.

In making such sale, it is laid down as a general rule, that the officer should conform as nearly as possible to such a method of procedure as a prudent man would observe in selling his own property for the purpose of getting the best price. (Bac. Abr. Ex'on, (C), 4; Cresson v. Stout, 17 Johns. (N. Y.) 116.) Hence he ought to sell specific articles separately, and not *en bloc*, at least in general, (Ibid.) And as, if he is interested in the execution, the law forbids him to levy it himself, or by his deputies, but he must commit it to the coroner, so if in any manner he perverts his official position to the prejudice of the parties, or either of them, and to his own advantage, his proceedings will be vacated; and so if he raise doubts about the title, and then himself buy the property at an under rate, or if he buys when he is himself the only real bidder. (Carter v. Harris, 4 Rand. 199.)

The statute of Virginia prescribes minutely the regulations touching the *place* and *time* of sale under execution, the *public notice* thereof to be given, and the *manner* of conducting the same. It is provided that the officer shall appoint a time and place of sale, and publish notice of the same for at *least ten days*, at some

place near the residence of the owner, if it be in the county or corporation, and at *two or more public places* in the officer's county, city, or district. And if the goods and chattels be *mules, work-oxen or horses*, notice of the sale must be published *at the door of the court-house* of the officer's county or corporation for *one month*, that is, on the next preceding court-day.

The sale is to be to the *highest bidder for cash*; and if for want of time, it be not completed on the day appointed, it may be adjourned from day to day until completed. (V. C. 1873, c. 49, § 36, 38.) Where the goods consist of *mules, work-oxen, or horses*, they are to be sold at the *court-house* of the county or corporation, between the hours of 10 A. M. and 4 P. M. on the *first day* of the term of the county or corporation court, next succeeding that at which they are advertised, unless when the parties *in writing* dispense with these provisions. (V. C. 1873, c. 49, § 37.)

Until April 1, 1879, upon debts incurred prior to April 10, 1865, the officer, when so required by the defendant, is to sell personal property on a *credit of twelve months*, (except as to costs and expenses of sale, which may be required *in cash*), taking from the purchasers bonds, with sufficient security, payable to the creditor for the amount of the execution, and as to any surplus payable to the debtor, and return such bonds along with the process *within twenty days* to the clerk's office, where they have the same force and effect as *forthcoming bonds* so returned, and execution thereon is awarded in the same manner. (V. C. 1873, c. 49, § 39; Acts, 1876-'7, p. 270, c. 262.) The duration of this statute has from time to time been prolonged, (Acts, 1873-'4, p. 101, c. 109; Acts, 1876-'7, p. 272, c. 262), and its constitutionality, which had been much doubted, has been judicially affirmed. (*Garland v. Brown's Adm'r*, 23 Grat. 173, 177 & seq.)

If the purchaser at the sheriff's sale fail to comply with the terms of sale, the officer may *sell* the property forthwith, or under a new advertisement, or may return that it is not sold for want of bidders. And if on a re-sale the property bring less than at first, the first purchaser is liable for the difference to the creditor, so far as is required to satisfy him, and to the debtor for the residue. (V. C. 1873, c. 183, § 33; *Maclean v. Dunn*, 4 Bing. (15 E. C. L.) 722; Chit. Cont. 431.)

The student is desired here to recall the explanation already given (*Ante*, p. 817-'18,) touching the officer's duty

where the property levied on belongs to a *tenant for life or years*, and is *on the leased premises* when seized. It will be remembered, that it is liable to the landlord in preference to the execution-creditor for rent due, or to become due, *not exceeding one year* in the whole, and that the officer, if made acquainted with the landlord's claim, is bound to pay that much, or to secure it to be paid, (supposing it to be not yet due,) by selling the goods in the latter case on a credit till the rent become due, taking bond with good security, payable to the person entitled to it, and delivering such bonds to him. (V. C. 1873, c. 134, § 12; Bac. Abr. Rent, (K), 8; Byrd v. Cooke, 1 Wash. 233; Crawford v. Jarrett's Adm'r 2 Leigh, 630.)

We have seen that the officer must conduct the sale as a prudent man, desirous to get the best price, would do in respect to his own property. He is not, therefore, at liberty to sell for a very inadequate price, but must return that he has levied the execution, and that the goods were not sold for want of bidders, (Keightly v. Birch, &c., 3 Campb. 523); and thereupon there issues a writ, called a writ of *venditioni exponas*, the nature of which will be next explained.

4th. The Writ of *Venditioni Exponas*.

The writ of *venditioni exponas* commands the officer to *expose to sale* the goods and chattels of the defendant which he has taken, and which he detains for want of bidders, &c.; and the effect of the precept is to require him to sell *at all events*, or, as it was paraphrased by Lord Ellenborough in the case just above cited, "*sell for the best price you can obtain.*" (3 Campb. 524.) See Rob. Forms, 361.

And whenever, from any cause, it appears by the return on an execution, that property taken to satisfy it remains unsold, this writ may issue, and "the like proceedings had thereon as on the first execution, except that if it issue for want of bidders, or of a sufficient bid, the notice shall say so, and that the *sale will be peremptory.*" (V. C. 1873, c. 183, § 34.)

So if the officer die before the sale, and he had no deputy acting in the case, a writ of *venditioni exponas* may issue, whereupon the property is to be turned over to the successor having the writ, or if it be refused, or if there be no personal representative of the deceased officer for three months, there may be an execution issued to seize such property. And upon this writ of *venditioni exponas* also, the same proceedings are to be had

as upon an original execution. (V. C. 1873, c. 183, § 35.)
 5th. The *Sheriff's Return* upon a *Fieri Facias*.

The next step is for the officer to make a *return or report*, endorsed on the process, and brought back with it, showing how he has proceeded therewith. (2 Tidd's Pract. 1018 & seq.) Very particular instructions on this point are contained in our statutes. Thus, it is required that the officer's *return or report shall be true*, and shall show the *day and manner* of executing the process, with the officer's name *subscribed* thereto. If the return is *by a deputy*, he is to subscribe it with his own name, as well as that of his principal, (as "J. S. deputy for L. B., sheriff of A. county.") Together with the process, he is to *return any bond* which he has taken under it, and an account of *any sales made* in pursuance thereof, specifying the articles sold, the prices and the purchasers. In case a sale be made under the execution, if no particular time is prescribed for the return, it must be made *within thirty days* after the sale, although in *executions* the *return-day* is always specified. The penalty for disregarding these directions is a fine of \$20, to the commonwealth, and for a *false return* \$100. And if the process be not duly returned, it is the duty of the clerk *ex officio*, to issue a rule against the officer, to show cause why he should not be fined. (V. C. 1873, c. 49, § 27.) The return must likewise show whether the money, or part of it, is or cannot be made, and must be accompanied by a statement of the amount received, and of the officer's fees and charges; and that amount, except the fees and charges, he shall pay to the person entitled. (V. C. 1873, c. 183, § 31.) The fact that the execution is in the officer's hands, raises the presumption that he has levied it and made the money, and if in point of fact it be not so, it is incumbent on him to show it. (O'Bannon v. Saunders, 24 Grat. 141-'2; Bart. Pract. 350.)

If the failure to return the execution, or to subscribe the return, shall continue after the infliction of the penalty above-mentioned, the forfeiture *may be repeated*, of \$20 for each month that the failure may continue, until it appears that the return cannot be made, or the amount of the execution be paid. The court may, moreover, fine the officer and his sureties, or any deputy in default, upon the motion of the party injured, (and it seems *for his benefit*, not that of the commonwealth), reasonable amounts, not exceeding *five per cent.* of the amount of the execution, for *each month* of failure to return the same, to be credited, if paid by the sureties, as between

the creditor and them on the judgment, but not as between the officer and the creditor, (V. C. 1873, c. 49, § 28; McDowell v. Burwell's Ex'or, 4 Rand. 317; Fletcher v. Chapman, 2 Leigh, 565.)

The process to and from other counties may be transmitted *by mail*, and proof by the postmaster's certificate or otherwise, that it was *duly mailed* is *prima facie* evidence that it *was received*, although the officer to whom it was addressed may exonerate himself by making oath that it was not received by him, nor as he verily believes, by any of his deputies. (V. C. 1873, c. 49, § 29.)

All writs of execution which are to be executed by the sole authority of the officer (without the intervention of a jury), such as a writ of *habere facias seisinam*, a writ of possession, a writ of *fieri facias*, &c., indeed almost all writs of execution, except an *elegit*, are good when *duly executed*, though *never returned*; for the plaintiff has the effect of his suit, and there is nothing further to be done on his part. Hence the common saying, that "*an execution executed is the end of the law.*" But in case of an *elegit*, as that is not executed by the officer's sole authority, but *by an inquest* taken by him in pursuance of the statute, as it formerly was, (V. C. 1860, c. 187, § 8, 9), he *must return the writ* in order that it may appear that he has pursued the directions of the statute. (Bac. Abr. Ex'on, (C) 1.)

The process may be returned on the *morning* of the return-day, without subjecting the officer to any liability, notwithstanding it shall appear that had he retained it he might on that day have successfully levied it. (Hinman v. Borden, 10 Wend. 369.) On the other hand, he may postpone his return until the *last moment* of the return-day, and down to that moment may levy it; or, as it is commonly expressed, he may execute the process *until the return day be passed*. (V. C. 1873, c. 166, § 2; Vail v. Lewis, 4 Johns. (N. Y.) 450; Dewe v. Elliott, 2 Cai. R. (N. Y.) 243.)

The officer's return, as long as it stands unaltered, although it may be controverted by strangers, (Cunningham v. Mitchell, 4 Rand. 189,) is *conclusive upon him*, and upon his sureties, unless it was procured by fraudulent collusion as between the creditor and officer, with a view to charge the sureties with the debt, the officer being insolvent. (Norris v. Crummey, 2 Rand. 329; Henry v. Stone, Id. 455; Dillon v. Roberts, 13 St. R. (Pa.) 60.) But the courts are liberal in permitting officers to amend their returns according to the truth, when a casual and honest mistake has occurred. (Bullitt's Ex'ors v. Winstons, 1 Munf. 369; Rucker v. Harrison, 6 Munf. 181;

Smith v. Triplett, 4 Leigh, 590.) Such amendments have been permitted, even after an action has been commenced, against the sheriff and his sureties, on his official bond, founded on such return. (Wadsworth, &c. v. Miller, &c. 4 Grat. 99; Stone v. Wilson, 10 Grat. 529.) It is said, however, that the officer cannot be *compelled* to amend his return, as indeed would seem an unavoidable conclusion, from the fact that the return is the *officer's sworn statement*. (Bac. Abr. Ex'on, (C) 1; Vastine v. Ferry, 2 S. & R. (Pa.) 426.)

The officer's return of the performance of acts beyond his duty under the process, is invalid as to such parts, and is no evidence; not only not conclusive, but not even *prima facie* evidence of the facts thus stated. But the return is still good to the extent he was authorized to make it. (5 Phill. Ev. 391; Shannon v. McMullin, 25 Grat. 218.)

It need scarcely be observed that it is the duty of the officer to have the money on the return-day of the writ, ready to be paid to the person entitled to it; although he is not obliged to go out of his county or corporation to pay it. (V. C. 1873, c. 183, § 31, 37.)

If the officer has not levied the execution before the return-day thereof, he has no authority afterwards to receive the money in his official character, and consequently his sureties are not bound therefor. (1 Rob. Pr. (1st. ed.) 532; Chapman v. Harrison, 4 Rand. 336.) But if he levies the execution before the return-day, he may sell the property, and consequently may receive payment afterwards, even after the expiration of his term of office. And in the absence of any evidence to the contrary, it is to be presumed that the sheriff did his duty, and levied the execution before the return-day, so that if, under that state of things, a payment is made to him on account of the debt, his official sureties are answerable for it. (1 Greenl. Ev. § 40; Wheaton v. Sexton, 4 Wheat. 503; Tyree v. Wilson, 9 Grat. 61; Ballard v. Thomas, 19 Grat. 24; O'Bannon v. Saunders, 24 Grat. 141 & seq; Paine v. Tutwiler, 27 Grat. 444.)

And if any surplus remains after satisfying the execution, he is to repay it to the debtor. (V. C. 1873, c. 183, § 36.) And so also he is to repay the money to the debtor if before he pays it over to the creditor the debtor shall obtain an injunction or supersedeas, unless such process shall otherwise direct. (V. C. 1873, c. 183, § 36.)

The penalties upon the officer for omitting to pay over the money made on execution, are formidable

where his default appears *by his return*; and if he omits to make a return, or make a *false return*, we have seen how he is to be dealt with. Judgment is to be given against him and his sureties for the principal and interest due at the time of the return, and *fifteen per centum per annum interest* on the aggregate from that time until payment. (V. C. 1873, c. 49, § 45.)

9^t. Proceedings to compel a Judgment Debtor to *Disclose and Surrender his Estate*.

We have seen (*Ante*, p. 826 & seq.) that when the levy of a *feri facias* is once made, it avoids all intermediate sales, gifts, and transfers of *tangible* property between the date of the delivery of the writ to the sheriff and the levy, so that, though the defendant has aliened the goods during that interval, the officer may, and ought, to seize them wherever within his bailiwick he may find them. (2 Tuck. Com. 363; Pegram v. May, 9 Leigh, 176; Carr's Adm'r v. Glasscock's Adm'r, 3 Grat. 343.)

At common law, this lien embraces those effects only upon which the execution *may be levied*, (V. C. 1873, c. 183, § 27); Carr's Adm'r v. Glasscock's Adm'r, &c., 3 Grat. 343); but in Virginia, by statute, it is made to comprehend, as we have seen, "all the personal estate of or to which the judgment debtor is possessed or entitled, although *not levied on, nor capable of being levied on*," except the homestead-exemption, the exemption under "*the poor man's law*," including the wages of a *laboring man*, (being a house-keeper or head of a family), not exceeding \$50 per month, and except that, as against an *assignee of any such estate* for valuable consideration, or a person *making payment* to the judgment debtor, the lien avails only from the time that *he has notice thereof*. But this provision is not to impair the lien acquired by an execution-creditor under the provision, (V. C. 1873, c. 183, § 27), declaring that as against "*purchasers for valuable consideration, without notice, and creditors, (the writ) shall bind what it may be levied on only from the time that the writ is delivered to the officer to be executed*," (V. C. 1873, c. 184, § 3; Puryear v. Taylor, 12 Grat. 401; Evans v. Greenhow, 15 Grat. 153; Charron v. Boswell, 18 Grat. 216.)

Let us next proceed to consider how the debtor may be compelled to deliver and surrender his estate. If the property be *visible*, and such as an execution can be levied on, it may be reached most promptly and effectually by that process; but if its existence or locality be unknown, or if it be incapable of being levied on, (as if it consist of *choses in action*, not negotiable, or *uncertain*

equitable interests, such as an *equity of redemption*), another procedure must be employed.

In order to ascertain the estate on which a writ of *fiery facias* is a lien, and to ascertain any real estate in or out of the commonwealth, to which a debtor named in such *fiery facias* is entitled, the creditor may file interrogatories, and a copy of the judgment, with a commissioner of the circuit, county, or corporation court, who is to issue a summons for the debtor, (pursuant to V. C. 1873, c. 172, § 44), servable only in the commissioner's own county or corporation; and if the debtor, being served with such summons, fails to appear within the time prescribed, and to file answers *upon oath* to the interrogatories; or if the commissioner deems the answers *evasive*, he may, after a rule or notice to show cause against it, issue an *attachment* to compel the debtor to answer the interrogatories filed, or any others which he may deem pertinent. But the commissioner is to report his proceedings to the court, along with any objections made by the debtor to answering; and if the court shall afterward sustain any of the objections, the answers given to the interrogatories objected to shall be *held for naught*, in that or any other cause. (V. C. 1873, c. 184, § 5.)

And if the debtor named in a writ of *fiery facias*, shall fail to obey the commissioner's summons, and the creditor shall by *affidavit* satisfy the commissioner that there is probable cause for believing that the debtor is *about to quit the State* unless he be forthwith apprehended, the commissioner shall issue a writ, directed to any sheriff or sergeant in the State, requiring him to take the debtor, and keep him safely until such answers to the interrogatories as the commissioner deems proper shall be filed, and such conveyance and delivery of the property as he deems proper shall be made, or until a circuit, county, or corporation court, or a circuit judge, shall direct the debtor's discharge. (V. C. 1873, c. 184, § 8.)

If the debtor be thus discovered to be the owner of any real estate *within the commonwealth*, it may be proceeded against in a court of equity, (the writ of *elegit* having been abolished, (V. C. 1873, c. 183, § 26); which may cause the property to be sold, if it appear that the rents and profits will not satisfy the judgment in *five years*. (V. C. 1873, c. 182, § 6 to 9.) But if the lands discovered be *out of this State*, the debtor is forthwith to convey them to the officer to whom the *fiery facias* was delivered, to be sold by him (unless the court shall

direct otherwise), as mules, work-oxen, and horses are directed to be sold (V. C. 1873, c. 49, § 36), and conveyed to the purchaser by the officer or his deputy. (V. C. 1873, c. 184, § 6, 10.) And this conveyance of the debtor's land without the State to the officer is enforced, if need be, by a writ commanding the debtor's arrest and imprisonment until he shall comply with the order, &c. (V. C. 1873, c. 184, § 6.)

If the answers of the debtor disclose that he has in his possession, or under his control, any money, bank-notes, securities, evidences of debt or other personal estate, they are to be delivered by him to the officer who has the *feri facias*, as far as practicable, or to such other and in such manner as the court may order, or the commissioner, when the answers are not in court. And in this case also, the delivery may be compelled, if occasion requires, by a writ commanding the arrest and imprisonment of the debtor until he complies. (V. C. 1873, c. 184, § 6.) When the delivery is of money, bank-notes, or goods and chattels, the officer is to dispose of them as if levied on under a writ of *feri facias*; if of evidences of debt, (other than bank-notes,) he may receive payment thereof within *sixty days*, after which he is to return them to the clerk's office if not paid; and thereupon the judgment-creditor may proceed against any person liable on such evidences of debt, (as he may also against any other person supposed to be liable by reason of the lien of the *feri facias*), by a summons against such person to answer the creditor's suggestion; whereupon the party thus summoned is to be examined on oath, and if the liability appear, the court may order him to pay what he owes, or to deliver any estate in his possession belonging to the debtor, to any officer whom it may designate. If the party fail to appear, or if it be suggested that he has not fully disclosed his liability, he may be proceeded against like a garnishee in an attachment, (V. C. 1873, c. 148, § 18, 19); but before the return-day of the summons, he may deliver and pay to the officer serving it, what he is liable for, and *so escape the costs*, unless it shall appear that he is liable for more than he paid or delivered. (V. C. 1873, c. 184, § 6, 10 to 15.)

The statute also provides that for the recovery of any estate, real or personal, on which the *feri facias* is a lien, or on which the judgment on which the *fi. fa.* issues is by law a lien, (V. C. 1873, c. 182, § 6,) or for the enforcement of any liability in respect to any such estate, a suit may be maintained *at law or in equity*, as the case may require, in the *name of the officer* to whom such

writ was delivered, or of any other officer designated for the purpose by the court; or any person interested may bring such suit at his own costs *in the officer's name*; nor is the officer bound to bring such suit unless he is first indemnified for the expenses and costs he may incur. (V. C. 1873, c. 184, § 16.)

It should have been stated in connexion with the functions of the commissioner, that he is required to report all his proceedings in these cases, together with the interrogatories, to the court in which the judgment is; or if it be a justice's judgment, to the county or corporation court of the justice's county or corporation. (V. C. 1873, c. 184, § 7.) And the court may make any order which it may deem right as to the sale and proper application of the estate conveyed, and delivered by the judgment-debtor as above described. (V. C. 1873, c. 184, § 9.)

Thus it appears, that provision, more or less complete, is made to reach all kinds of property, and to subject it to debts, whether it be real property in or out of the State, or personalty; and if personalty, whether it be in possession or *in action*, or whether either class of property be legal or equitable.

3°. Writ of *Levari Facias*.

The writ of *levari facias* commands the officer, that he cause the amount of the judgment, including costs, to be levied of the *lands and chattels* of the defendant; but notwithstanding its terms, it is not understood to authorize the officer to *meddle with the lands* farther than to collect the debt out of the *profits thereof*, as the corn, grass, or other crops growing thereon, or out of the rents payable to the debtor. (Bac. Abr. Ex'on, (C), 4; Fitzh. Nat. Br. 593; Davy v. Pepys, 2 Plowd. 441.)

So far as regards *goods and chattels*, this writ does not seem to differ materially from a *feri facias*; and as regards *lands*, the *elegit*, (whilst it subsisted,) which puts the creditor in possession of them, was preferable, as a proceeding in chancery still is, to the *levari facias*, which subjects only the *profits*. Hence, the *levari facias* had for a very long period been practically disused before our statute in Virginia abolished it. (V. C. 1873, c. 183, § 21; 2 Tuck. Com. 371.)

4°. Writ of *Capias ad Satisfaciendum*.

The writ of *capias ad satisfaciendum*, which is familiarly known as a writ of *ca. sa.*, appears to have existed at common law, as we have seen, to a very limited extent, if at all, probably only at the suit of the Crown. The statute 13 Edw. I, c. 11, authorized it in judgments in

certain actions of *account*; and afterwards, by various statutes, it was allowed in other actions, as has been before explained, *Ante*, p. 803, (Bac. Abr. Ex'on, (C), 3; Harbert's Case, 3 Co. 11, 12.)

The writ commands the sheriff or other officer to take the defendant's body, and it safely keep, to *satisfy the plaintiff* of his judgment, &c. In England, the defendant is kept in prison until he *pays the debt or dies*, unless he is discharged by consent of the plaintiff, which operates the discharge of the debt also. If so severe a policy ever prevailed in Virginia, it was soon abandoned; for a series of enactments, beginning in 1644-'5, with a provision that poor debtors in execution for *corn, tobacco, &c.*, (then and long after the principal currency of the colony) might satisfy the demand at the discretion of the county commissioners, by some *equitable commutation*, (1 Hen. Stats. 294, 346, 453; 2 Do. 81); was in 1705, matured into an act permitting a debtor, after he had *lain three months in prison*, to discharge himself by surrendering his *whole estate* for the payment of the debt. (3 Hen. Stats. 388.) And for many years past, and for many years prior to the abolition of the writ of *capias ad satisfaciendum*, a debtor in custody has been allowed *immediately* to discharge himself in like manner, increasing facilities having been, from time to time, afforded for the purpose. See 1 R. C. 1819, c. 134, § 1, 28; Supplement to R. C. 1819, c. 216; Acts 1842-'3, p. 50, c. 74, § 1 to 3; Shirley v. Long, 6 Rand. 737; Harrison v. Emmerson, 2 Leigh, 764.

The writ of *ca. sa.* was long much used in Virginia, and the learning relative to it was formerly of great practical importance; but the code of 1849 having in effect abolished it, (V. C. 1873, c. 184, § 2), it will suffice now to refer to the copious exposition of it in 1 Rob. Pr. (1st ed.) 548, &c., and 2 Tuck. Com. 343, &c.

The spirit of morbid sympathy, and of excessive indulgence towards the debtor-class, which by degrees led to the abolition of imprisonment for debt, and the abandonment of the *ca. sa.*, was signally rebuked by the result. A few month's experience ascertained that it was only by sharp personal coercion, through imprisonment, that the tricks of fraudulent debtors could be kept in check, and the production of their property enforced. In less than a year the legislature found itself constrained to restore, in effect, the policy of compelling, by confinement in jail, if needful, a frank disclosure of a debtor's effects and their prompt delivery. The new provision is indeed better guarded against abuse, inasmuch as the process of arrest and imprisonment is now awarded, not at the caprice and

whim of the creditor, as formerly it was, but only in the discretion of a commissioner of the court. (V. C. 1873, c. 184, § 5, 6, 8.) But on the other hand, the stringency of the process when issued is markedly increased; for whereas the debtor was formerly allowed to deliver himself from custody under the *ca. sa.*, by taking the insolvent debtor's oath, how well soever the authority administering the oath might be satisfied that he was swearing falsely, (Shirley v. Long, 6 Rand. 737; Harrison v. Emerson, 2 Leigh, 764), under the existing law he is not to be discharged until the *commissioner is satisfied* that he has, in good faith, given up all the property liable to his debts. (V. C. 1873, c. 184, § 5, 8.)

SECTION viii.

8^b. Proceedings in the *Nature of Appeals*.

The object of appellate proceedings is to obtain the *correction of errors*, which are alleged to have occurred in the progress of a cause, to the prejudice, as he insists, of the complainant, who proposes to resort to the proceedings. The errors in question are, in some instances, *errors of fact*, but more frequently they are *errors of law*. The application is usually made to a higher court, but in some instances the same court where the imputed mistake is alleged to have occurred is competent to correct it, and in those cases resort must be had to that court.

Errors in judicial proceedings are sometimes proved extrinsically, but far more generally they must appear *in the record*, (which is the only authentic history of the cause), and cannot be shown by extrinsic evidence. In the further prosecution of the subject it is proposed to consider,—

(1), The *several sorts of proceedings* in the nature of appeals;

(2), The *course of appeal*,—that is, as between what courts;

(3), The *stage of the cause* at which proceedings by way of appeal are allowed; and,

(4), The *mode of setting on foot and conducting* proceedings by way of appeal;

W. C.

1^c. The *Several Sorts of Proceedings in the Nature of Appeals*.

The proceedings in the nature of appeals allowed by our law for the correction of errors in judicial proceedings after judgment, are four, namely:

(1), The writ of *audita querela*; (2), The writ of error; (3), The writ of *supersedeas*; and (4), The process of appeal;

W. C.

1^d. The Writ of *Audita Querela*.

The writ of *audita querela* is an antiquated proceeding, whereby a defendant, against whom judgment is recovered,

and who is in danger of execution, or perhaps actually in execution, may be relieved, upon good matter of discharge, which has happened *since the judgment*, as if the plaintiff hath given him a general release; or if the defendant hath paid the debt to the plaintiff, without procuring satisfaction to be entered on the record. In these and the like cases, wherein the defendant hath good matter to plead, but hath had no opportunity of pleading it, (either at the beginning of the suit, or *puis darrein continuance*, which must always be before judgment), an *audita querela* lies to be relieved against the oppression of the plaintiff through the abuse of the court's process. So that it is no more than an invocation of that inherent equity which resides in all courts of justice, to prevent their own proceedings and process from being perverted to purposes of iniquity and oppression. The writ of *audita querela*, (issuing in England out of the ordinary court of chancery, which is the great manufactory of writs), is addressed by the Crown to the court whose process is abused, stating that the complaint of the defendant hath been heard, (*audita querela defendantis*), and then setting out the matter of the complaint, it at length enjoins the court to call the parties before it, and having heard the allegations and proofs, to cause justice to be done between them. (3 Bl. Com. 405.)

It is manifest, from this recital, that in this proceeding the complainant relies on *matters of fact*, and *not of law*; and that he cannot rely upon the record to exhibit the grounds of his complaint, but must prove them by *extrinsic evidence*.

No provision is made by statute in Virginia for the writ of *audita querela*, and it may, therefore, be a question from what court it should be issued with us; we having only the equitable or *extraordinary*, and not the ordinary branch of the court of chancery, which in England is the *officina justitiæ*, or *officina brevium*. (3 Bl. Com. 48.) It is supposed, however, that it ought without doubt, to issue from the clerk's office of the court whose judgment and execution are abused and perverted, just as we shall presently see that the writ of error *coram vobis* does, and for a similar reason.

But the indulgence of the courts in granting summary relief *upon motion merely*, in cases of such evident oppression, has for more than a century practically superseded in most cases the writ of *audita querela*, and rendered it well nigh useless. (3 Bl. Com. 406 & n (3).)

But see 1 Tidd's Pract. 212 & n [1]; *Hanson v. Blakey*, 4 Bingh. (15 E. C. L.) 493; *Nathan & al v. Giles*, 5 Taunt. (1 E. C. L.) 558; *Baker & als v. Ridgway*, 2 Bingh. (9 E.

C. L.) 41.) From these authorities, it seems that when *the case is plain*, relief may be had, on motion; but otherwise the *audita querela* is proper, and must be resorted to.

2^d. Writ of Error.

There are two kinds of writs of error, which must be carefully discriminated, differing as they do in most important particulars of nature and function; although in other particulars they are alike.

They are the writ of error *coram vobis*, (or *nobis*), and the writ of error *generally*. They both issue in England out of *chancery*; both at common law are grantable *ex debito justitiæ*; and both operate whilst they are pending to *supersede* the judgment which they seek to correct;

1st. Writ of Error *Coram vobis* (or *nobis*.)

The writ of error *coram vobis* (or *nobis*), is where the alleged error consists of *matter of fact*; the writ of error *generally* where it consists of *matter of law*.

The former derives its designation from certain words which were contained in the mandate of the writ itself, when it was in Latin; which, commanding the court where the proceedings occurred to inspect the record, and correct any error found therein, states that the record in question still remains *coram vobis*, (before you), in the courts of common pleas and exchequer, and *coram nobis*, (before us), in the king's (or queen's) bench where the monarch *theoretically* presides in person. It follows, therefore, that in this country, the proper designation is *coram vobis* in all cases, our commonwealths never being present in person, in their courts.

Let us now consider in what consists the error which it is the province of a writ of error *coram vobis* to correct.

Where an issue *in fact* has been decided, the common law admits no appeal from the decision, except in the way of motion *for a new trial*, (St. Pl. 96; Id. (Tyler,) 125-'6); and its being decided wrongly is *not error* in that technical sense to which a writ of error refers. So if a matter of fact should exist, which was not brought into the issue, but which, if brought into issue, would have led to a different judgment, the existence of such fact does not, after judgment, amount to error in the proceedings. For example, if the defendant has a release, but does not plead it in bar, its existence cannot, after judgment, on the ground of error or otherwise, in any manner be brought forward. But there are certain facts which affect the *validity and regularity of the legal proceeding itself*; such as that the defendant, being *under age*, appeared *by attorney*, instead of *by guardian ad litem*; or the plaintiff or defendant having been a *married woman* when the suit was commenced, and her

husband not being joined; or the plaintiff being *dead*, when judgment is pronounced. Such facts as these, although not discovered or alleged until after judgment, make the proceedings erroneous, and are sufficient to reverse the judgment upon writ of error; and to such cases the writ of error *coram vobis* applies, because the error growing out of a disregard of the fact is not the error of the judges, and to reverse it is not to reverse their own judgment. (St. Pl. 118-'19; Id. (Tyler,) 142-'8.)

The mandate of the writ, it must be observed, which, in all cases of writs of error, is addressed to the court where the mistake occurred, imports in the writ of error *coram vobis*, not that the record be certified *to the higher court*, as in case of a writ of error *generally*, but that it be *inspected by the same court*, and if the error suggested be found to exist, that it be corrected. Thus, if after the judgment it should appear that the plaintiff *was dead* when the judgment was rendered, the defendant might obtain a writ of error *coram vobis*, requiring the court to inspect the *record and proceedings*; and if it be discovered (of course, in that case, by extrinsic inquiry and evidence,) that the irregularity has been committed, to make the needful correction, which would be done by reversing the judgment, and if the case were capable of being revived in the name of the plaintiff's representatives, it might then be revived accordingly, and be proceeded with. (Williamson's Adm'r v. Appleberry, 1 H. & M. 206.) And so if an infant defends *by attorney* instead of *by guardian*, if the error be not cured by the statute of *jeofails*, as it is if the verdict be *for the infant, and not to his prejudice*, (V. C. 1873, c. 177, § 3,) it may be corrected by a writ of error, *coram vobis*. (Cole v. Pennell, 2 Rand. 174.)

If the adversary does not admit the truth of the fact alleged, (being extrinsic to the record,) which is the ground of the writ of error, it must be ascertained *by a jury*.

All writs of error are, *in England*, as we have seen, issued *out of chancery*, and constitute a *commission* to the judges named in them, whether of the same or a higher court, to examine the record, and to affirm or reverse the judgment, according to law. With us, although, like all other writs, they are *in the name of the commonwealth*, yet they issue from the court which is to *revive the proceedings*, and consequently, in the case of writs of error *coram vobis*, from the court where the judgment was rendered.

The form of a writ of error *coram vobis* will help to illustrate its nature and objects.

It is as follows :

WRIT OF ERROR CORAM VOBIS.

The Commonwealth of Virginia,

To the Judge of the Circuit Court of A. County, greeting :

Because in the record and proceedings, and also in the rendering of the judgment in a certain action of debt, instituted in our said court, by P. P. against D. D., (which record and proceedings *before you* now remain, as it is said,) manifest error hath happened, to the great damage of the said D. D., as by his complaint we have understood. We being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, in this behalf, command you, that if judgment be given in the action aforesaid, then the record and proceedings being inspected, you further cause to be done therein to correct that error, what of right and according to law ought to be done.

Witness, B. T., clerk of our said court, this — day of —, in the year of our Lord, —, and in the — year of our foundation.

Teste :

B. T., C. C.

Writs of error of both kinds were at common law grantable *ex debito justitiæ*, as a matter of course, without application to the court; and it appears not to have been until the third year of James I., that the obvious precaution against frivolous delays from this source was resorted to, of requiring plaintiffs in error (except in a few cases,) to find substantial sureties for the prosecution of the writ. (3 Bl. Com. 410; Bac. Abr. Error (A), 2.) And yet the writ was always deemed to operate a *supersedeas*, and to restrain any proceedings in the cause in the court below, unless indeed, in a few special cases. (Bac. Abr. Error, (4).)

In Virginia, this common law principle as to writs of error *generally*, has been altered by statute, so that such a writ of error, namely, for *matter of law*, is not obtainable save at the *discretion of the appellate court*. But writs of error *coram vobis* are not within the provisions of these statutes, so that they may still be had *ex debito justitiæ*, and it seems without application to any judge, from the clerk in his office, (Cole v. Pennell, 2 Rand. 174); although in order that such writ may operate as a *supersedeas* to stay proceedings on the judgment complained of, it is requisite to *give bond and security* to pay the amount of the judgment, with costs and damages, if it be affirmed. (V. C. 1873, c. 178, § 13; 1 Rob. Pr. (1st ed.) 644.)

For many years, as well in England as with us, relief has been generally obtainable on simple motion wherever a writ of error *coram vobis* is applicable, and consequently the proceeding has fallen gradually into disuse. (Gordon v. Frazier, &c., 2 Wash. 130; 1 Rob. Pr. (1st ed.) 644-5); and now it is expressly provided by statute, that for any *clerical error*, or error in fact for which a judgment may be reversed or corrected on writ of error *coram vobis*, the

same may be reversed or corrected *on motion*, after reasonable notice by the court, or if the judgment be in a circuit court, by the judge thereof in vacation. (V. C. 1873, c. 177, § 17.)

2°. Writ of Error *generally*.

The writ of error *generally* is applicable when *errors of law* have occurred in the proceedings, and in the judgment of an inferior court, and those errors are *visible on the face of the record*. Such error may have happened by the court below having *wrongly decided an issue in law*, brought before it by demurrer; but it may happen also in other ways. Thus, it may occur by a wrong decision of the inferior court upon a *demurrer to the evidence*, or upon a *special verdict*, or a *case agreed* or *special case*, or where it appears from a bill of exceptions that the court erred in allowing *illegal evidence* to be introduced, or in *excluding* that which is legal, or in granting *erroneous instructions*, or denying such as are proper, or in *improperly overruling* or *improperly granting* a new trial, or in *improperly arresting* or *refusing to arrest* a judgment, or in short, wherever it appears *on the face of the record*, that an *error in law* has been committed, *provided always* the error be of a *substantial kind*. For we have seen that by the statute of *jeofails*, a judgment is to be neither arrested nor reversed for errors of *mere form*, as at common law it might have been. (V. C. 1873, c. 177, § 3; *Ante*, p. 764 & seq.)

It will be recollected that in explaining the doctrine touching motion *in arrest of judgment*, there was an enumeration made of what mistakes should not be cause of *arrest or of reversal* of judgment. (*Ante*, p. 765); and that the *general principle* as to the effect of the statute of *jeofails* in curing errors, is that it cures a *defective statement* of a cause of action or defence, but not a statement which fails to make *any cause of action*, or *any defence* at all. (Braxton's Adm'r v. Lipscomb, 2 Munf. 282; Buckner v. Blair, 2 Munf. 336; Green v. Dulaney, 2 Munf. 520; Laughlin v. Flood, 3 Munf. 273; Tompkins v. Branch Bank, 11 Leigh, 372; Mason v. Farmers Bank, 12 Leigh, 90; Ross v. Milne & ux, 12 Leigh, 217; Boyle's Adm'r v. Overby, 11 Grat. 202.) And that in like manner, whilst the statute cures *mis-joinder* or *informal joinder* of issue, (Walden v. Payne, 2 Wash. 1; White v. Craig's Ex. 7 Leigh, 681), it does not cure the *non-joinder*, or *want of issue altogether*, (Stevens v. Taliaferro, 1 Wash. 155; Totty's Ex'or v. Donald, &c., 4 Munf. 430; Sydnor v. Burke, 4 Rand. 161; McMillan v. Dobbins, 9 Leigh, 422), except so far as the mere want of *similiter* goes, for which

an express provision is made, that it shall be cured, (V. C. 1873, c. 177, § 3; *Ante*, p. 766 & seq.)

It will be remembered also, that it is declared by statute, that a judgment *on confession* is equal to a *release of errors*, as to which see *Ante*, p. 768, and V. C. 1873, c. 177, § 2. The writ of error issues with us, not out of the *chancery*, as in England, but from the *appellate court*. It can be obtained only by exhibiting to the appellate court, or some judge thereof, a complete *transcript* of the record, accompanied by a certificate of counsel practising in the appellate court, that there is error therein, and also by a petition designating the errors. If the appellate court, or the judge thereof, to whom the transcript of the record is submitted, shall be of opinion upon inspecting it that there is *reasonable doubt* of the justice of the judgment (or as the statute expresses it, that the decision *ought to be reviewed*), the writ of error must be allowed upon the terms prescribed by law; otherwise it must be denied (V. C. 1873, c. 178, § 5, 8 to 11); and if it be denied upon the *express* ground that the judgment is *plainly right*, no other petition is to be presented except to a *yet higher court*. (V. C. 1873, c. 178, § 10.)

The terms prescribed are, that except where the writ of error is proper to protect the estate of a decedent, a convict, or an insane person, the writ shall not take effect until bond is given by the petitioners, or one of them, or some other person, in a penalty to be fixed by the appellate court or judge, conditioned to satisfy the judgment in case it be affirmed, or the writ of error be dismissed, together with all the damages, costs, and fees awarded against or incurred by the petitioner. When the writ of error is awarded by the *circuit court*, the bond is to be taken by the clerk thereof before the writ is issued; and when awarded by the *court of appeals*, it is to be endorsed by the clerk of that court, that it is not to be effectual until such bond is executed before the *clerk of the court below*. (V. C. 1873, c. 178, § 14.)

A writ of error, (as indeed is true also of an *appeal* and a *supersedeas*), is at present limited, (but only in case of a *final*, not of an *interlocutory* judgment or decree, *Hendricks v. Fields*, 26 Grat. 452), to *two years* from the date of such *final* judgment or decree, reckoning to the time when the record is first delivered to the clerk of the appellate court, or before the giving of the bond; excluding, however, the time from presenting the petition for the appeal, &c., (which time the judge is to endorse,) to the delivery of the record to the clerk of the appellate court; and provided, that if the judgment were obtained before November 5,

1870, the limitation is *two years, nine months, and ten days*. (V. C. 1873, c. 178, § 317; *Yarborough v. Deshazo*, 7 Grat. 375-'6; *Otterback v. A. & F. R'lway Co.*, 26 Grat. 940; *Callaway v. Harding*, 23 Grat. 542, 547, 549; *Sexton v. Crockett & als*, Id. 857.) As the provisions of the stay-law operated no hinderance to appeals, writs of error or *supersedeas*, so no time is to be deducted on account of that law in ascertaining whether any proceeding of that kind is barred. (*Rogers v. Strother*, 27 Grat. 422.)

Like all other writs in Virginia, the writ of error is in the name of the commonwealth, and bears *teste* by the clerk of the court whence it issues. (Va. Const. 1869, Art. 17, § 26.) It is addressed to the court whose judgment is complained of, and is generally accompanied, (at least in criminal cases,) by an express clause of *supersedeas*, as it is called, the object of which is to suspend the execution of the judgment, (V. C. 1873, c. 203, § 6); although it is commonly said that, at common law, a writ of error is a *supersedeas by implication*.

A writ of error is in theory applicable to both civil and criminal cases; but in practice in Virginia it is rarely employed, *save in the latter*. In the United States courts it is employed *in civil cases*.

The form of a writ of error *generally* will illustrate what has been said of it.

WRIT OF ERROR GENERALLY FOR MATTER OF LAW.

The Commonwealth of Virginia,

To the judge of the circuit court of the county of A., greeting:

Whereas, in the record and proceedings, and also in the rendition of the judgment in our said court, given on the — day of —, in the year of our Lord eighteen hundred and —, against J. M. J., upon an indictment for murder, manifest error hath happened, to the great damage of the said J. M. J., as by his complaint we have understood. We being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done in this behalf to the said J. M. J., do command you that the record and proceedings aforesaid, with all things touching the same, you, under your seal distinctly and plainly, send to our supreme court of appeals, at the State court-house, in the city of Richmond, on the first day of the next term; so that our said court of appeals, the record, and proceedings aforesaid being inspected, may further cause to be done therein what of right, and according to law, ought to be done; and that you cause it to be made known to the sheriff of our said county, that it is our command that, from all other proceedings on the judgment aforesaid he altogether *supersede*. And have then there this writ. Witness G. L. C., clerk of our said court of appeals, at Richmond, this — day of —, in the year of our Lord eighteen hundred and —, and of our foundation the —.

Teste,

G. L. C., C. C.

3^d. The Writ of *Supersedeas*.

The writ of *supersedeas*, like the writ of error *generally*, is

awardable only for *error in law* apparent on the *face of the record*; the errors being identical with those which warrant the latter writ, of which many instances have already been stated, (*Ante*, p. 851, &c.) It is awarded also in like terms; and indeed differs from a writ of error *generally* in nothing but the formal tenor of it, and in the fact that in *practice* in Virginia, it is preferred in civil cases to the writ of error, and cannot be used in *criminal cases* at all. The difference in its tenor from a writ of error is that it is addressed *to the sheriff*, instead of *to the judge*, and commands him to forbear further proceedings on the judgment; informs him that the record thereof has been removed into the appellate court, for the correction of errors therein; and enjoins upon him to give notice to the other party to appear in the appellate court, and answer the complaint in error. From the form presently to be given, it will appear that the precept to the sheriff in this writ is *direct and express to supersede from further proceedings*, and not *implied only*, as at common law it is in the writ of error.

WRIT OF SUPERSEDEAS.

The Commonwealth of Virginia,

To the *Sheriff* of the County of A., greeting:

We command you, that from all further proceedings on a judgment of our circuit court for the county of A., obtained on the — day of —, in the year of our Lord eighteen hundred and —, by P. P. against D. D., for — dollars, with interest thereon after the rate of — per centum per annum, from the — day of —, in the year of our Lord eighteen hundred and —, until paid, and the costs you altogether supersede, which judgment before the judges of our supreme court of appeals for cause of error in the same to be corrected, on the humble petition of the said D. D., we have caused to come, he the said D. D. having given security to prosecute with effect, and if the judgment aforesaid shall be affirmed, or this writ shall be dismissed, to satisfy and pay the said judgment, and all such damages, costs, and fees as shall be awarded against him. We also command you that you give notice to the said P. P., that he be before the judges of our said supreme court of appeals, at the State court-house in the city of Richmond, on the first day of the next term, then and there to have a rehearing of the whole matter in the judgment aforesaid contained. And have then there this writ. Witness, G. L. C., clerk of our said court of appeals, at Richmond, this — day of —, in the year of our Lord, eighteen hundred and —, and of our foundation the — year.

Teste:

G. L. C., C. C.

4^d. The Process of *Appeal*.

The three writs already mentioned, namely, the writ of *audita querela*, the writ of error (of both sorts), and the writ of *supersedeas*, are all intended to correct errors occurring in the course of *common law proceedings* in the courts of *common law*. To the common law, *appeals* (so-called) are

unknown. They are employed only in those classes of cases where the *civil law method* of proceeding has been adopted.

The common law processes for reviewing judgments do not draw again into question *any fact* which has been already pronounced upon by the proper tribunal. They aim only to correct *errors of law* arising out of the facts; errors which in the *audita querela*, and in the writ of error *coram vobis*, may be suggested by extrinsic proof, but in a writ of error *generally*, and in a writ of *supersedeas* must be apparent *on the face of the record* itself.

The proceeding by way of *appeal*, on the other hand, involves the review, by the appellate court, of *the fact* as well as *the law*. And this diversity grows naturally out of the very different modes of investigating and determining questions of fact employed by the *civil law* and the *common law*, respectively. The common law inquired into and determined such questions, *never by the court*, except in a few rare instances, (manifesting a great distrust of the court for that purpose), but *by a jury*, or by *wager of law*, or by *wager of battle*, (*Ante*, p. 679, &c., 682 &c.) none of which in their nature admitted, without incongruity of the re-consideration of the facts which they ascertained, either by the court which first heard the cause, nor *a fortiori*, by a higher court. Nor indeed, (according to the system of the common law, which required all oral testimony to be delivered *viva voce* in court, and made no provision for its being written down, either before delivery or afterwards), did the record contain any memorial of the evidence exhibited at the trial, unless it was artificially put there by means of a *bill of exceptions*, which was itself a subsequent contrivance, owing its origin probably to the Stat. 13 Edw. I, c. 31, (*Ante*, p. 742 & seq; St. Pl. 89; *Id.* (Tyler,) 121.) But the civil law referred disputed facts always *to the court*, and the evidence, as well the testimony of witnesses as that derived from documents, was *wholly written*, was uniformly and of course, made part of the record; thus putting into the possession of the appellate court all the materials necessary for a review of the decision of the facts; whilst, as no collateral agency was employed in such decision, but the same was made *by the court*, there was no inconsistency in submitting as well the facts as the law to the higher tribunal.

Appeals being employed in England in those courts which proceed by the *methods of the civil law*, namely, the courts ecclesiastical, and those which, by recent statute, have succeeded to their jurisdiction over testamentary and matrimonial causes, (Wms. Pers. Prop. 305 & seq., 360 & seq); maritime courts and the court of equity, they are used with us in causes which in England are *cognizable in those courts*

respectively; as in causes in equity generally, causes touching wills and administrations; divorce and marriage causes; causes in admiralty (that is, touching maritime torts and contracts), and prize causes; and those occurring under the revenue and navigation laws of the United States. And to these are added by statute, (it is not very apparent for what reason), certain causes of *police and public economy*, such as those relating to the opening or discontinuing of roads, building of mills, orders relative to ferries, and orders relative to landings. (V. C. 1873, c. 178, § 1, 2.)

Formerly appeals were allowed at the arbitrary pleasure of the dissatisfied party; but that being found to be attended with great abuses and inconveniences, (2 Rob. Pr. (1st ed.) 423-'4; *Graves v. Graves*, 1 Leigh, 34), the right of arbitrary appeal has, for many years past, been restricted to cases where "any person thinks himself aggrieved *by an order* in a controversy concerning the probate of a will, or the appointment or qualification of a personal representative, guardian, curator, or committee; or concerning a mill, roadway, ferry, or landing," made in a county (not *corporation*, V. C. 1873, c. 178, § 12) court; and such appeal must be taken *during the term* at which the order is made, and *bond be given* according to law.

And *in no case* is such arbitrary appeal allowed from a circuit or corporation court to the court of appeals. In these cases the circuit court may have witnesses examined, but in no other case; and *in no case* shall the court of appeals hear *parol* testimony. In that court the record must always contain the *whole case*. (V. C. 1873, c. 178, § 22.) And it must be observed, that although parol evidence may thus be heard in the circuit court on an arbitrary appeal, yet the cause is not exactly to be heard there over again. Thus, as a general rule, a party can make in the circuit court *no objections to the proceedings*. Such objections ought to have been made in the county court, and if they are not, they are to be considered as waived. (*Mitchell v. Thornton*, 21 Grat. 164.)

2°. The *Course of Appeal*; W. C.

1°. The *Course of Appeal in Civil Causes*; W. C.

1°. Appeal from the *County Court to the Circuit Court*.

Every appeal, writ of error, or *supersedeas*, when it is from or to a judgment, decree, or order of the *court of any county*, shall be docketed in the circuit court which has jurisdiction over such county. But if the circuit court or judge refuse a writ of error, appeal or *supersedeas*, an application may be made immediately to the court of appeals, or a judge thereof, and the latter court or judge may grant the proper appellate process, provided such court would

otherwise have jurisdiction, and then it shall be docketed and heard in the court of appeals. (V. C. 1873, c. 178, § 12.)

No *pecuniary amount* seems to be ever required in the circuit court, except in case of an appeal to the county court, from the decision of a justice in a case of *unlawful detainer* by landlords against tenants, for premises withheld by the latter, where the lease of the tenant was originally for a period *not exceeding one month*. (V. C. 1873, c. 130, § 1.) In such case the circuit court has appellate jurisdiction from the county court only where the annual value or rental of the property *exceeds one hundred dollars*. (V. C. 1873, c. 130, § 5.)

Every cause decided by the county court (except appeals from the judgments of *single justices*, V. C. 1873, c. 147, § 16, 17,) may be taken by the *proper appellate process*, (whether that be writ of error, writ of *supersedeas*, or appeal,) to the circuit court, to be there reviewed. (V. C. 1873, c. 178, § 3.)

It will be remembered, that appellate proceedings are limited to *two years* after final judgment, order, or decree rendered, (V. C. 1873, c. 178, § 3,) with some qualifications stated, *ante*, p. 852, &c. *Post*, p.

2°. Appeal from the Circuit and the Corporation Court to the Supreme Court of Appeals in *Civil Causes*.

Every appeal, writ of error, or *supersedeas* to or from the judgment, decree, or order of any other court than the county court, (that is, to or from the *circuit and corporation courts*,) shall be docketed in the court of appeals. (V. C. 1873, c. 178, § 12.) But the court of appeals, by the constitution, has no jurisdiction when the controversy is *pecuniary*, and is less in value or amount than \$500, exclusive of costs. But if there be drawn in question a freehold or franchise, (that is, such a franchise as is contemplated in the corresponding clause of the constitution, viz: a franchise concerning a mill, roadway, ferry, landing, or the right of a corporation or county to levy tolls or taxes,) or the title or bounds of lands, or some matter *not merely pecuniary*, the amount or value is not to be considered. (V. C. 1873, c. 178, § 3; Va. Const. 1869, Art. VI, § 2; *Neal v. Commonwealth*, 21 Grat. 515.)

In order that a defendant may enjoy the right of appeal, where it depends on *amount*, the *judgment or decree* must be for at least \$500, *principal and interest* to that date; and that the *plaintiff* may enjoy it, his *claim* must be not less, principal and interest, than \$500. (*Gage v. Crockett*, 27 Grat. 735.) And if several creditors are seeking by *creditor's bill* to subject property to their debts, no one of which

amounts to as much as \$500, although in the aggregate the sum is much greater, there can be no appeal on the creditors' part, because their claims are independent one of another; but the owner of the property where the total of debts is as much as \$500, although severally the claims be less, may appeal. (*Umbarger v. Watts*, 25 Grat. 167; *W. & S. R. R. Co. v. Colfert*, 27 Grat. 779-'80; *Devries v. Johnston*, 27 Grat. 808.) So where the interests of appellants are separate and distinct, the decree may be reversed as to one, and dismissed as to another, as having been improvidently awarded, because the subject in controversy as to him is less than \$500. (*Cocke v. Minor*, 25 Grat. 260.)

2^d. The Course of Appeal in *Criminal Causes*.

The course of appeal in *criminal causes* is from the county court to the circuit court, and from the circuit and corporation (or *city*) court to the supreme court of appeals; W. C.

1^o. From the County Court to the Circuit Court.

The county court has *exclusive* original cognizance at present to *try* all crimes, of every grade, committed in the county, except that a person to be *tried for arson*, or for any felony for which he may be *punished with death*, may, upon his arraignment in the county court, demand to be tried in the circuit court of the county. (Acts 1874-'5, p. 364, c. 271.) And a writ of error lies in a criminal case, to a judgment of a county court, from the circuit court having jurisdiction over such county, at the instance of the accused in any case, and at the instance of the *commonwealth* in cases of violation of a law *relating to the revenue*. (V. C. 1873, c. 203, § 3.)

2^o. From the Circuit Court, or from a Corporation or City Court, to the Supreme Court of Appeals.

The corporation or city courts have, within their respective limits, the same original jurisdiction (criminal and civil) as the circuit courts, and the same jurisdiction as county courts over *all offences* committed within their limits. (V. C. 1873, c. 154, § 38.) And a writ of error lies in a criminal case to the judgment of a circuit, or a corporation or hustings court, from the court of appeals, at the instance of the accused in any case, and at the instance of the *commonwealth* in case of violation of a law *relating to the revenue*. (V. C. 1873, c. 203, § 3.)

3^o. At what stage of the cause Proceedings by way of Appeal are allowed.

It will be easily conceived that it is not every order of a court in a cause, however incidental such order may be, that will in good sense and wise policy, warrant an ap-

pellate proceeding in order to correct an apprehended error therein; and that such proceeding must probably be confined to those orders which have about them a certain character of finality and conclusiveness, either in respect to the general merits of the cause, or in respect to some branch thereof, or of some matter collateral thereto, and yet of great interest to the parties, or to one of them. The student cannot fail to perceive how, in the main, these principles have been carried out in the provisions of our statutes in Virginia, now to be cited. (V. C. 1873, c. 178, § 2.)

The rules prescribed allow the *appropriate appellate proceeding*, (whether by appeal, writ of error, or supersedeas,)—

(1), Where there is *any order* in a controversy concerning the probate of a will, or the appointment or qualification of a personal representative, guardian, curator, or committee, or concerning a mill, roadway, ferry or landing.

The proper appellate proceeding in this class of cases is in the *county court*, an *appeal as of right* to the circuit court, provided the appeal be entered and bond be given *during the term* of the county court at which the order complained of was made. Under any other circumstances in the county court, and under all circumstances in the circuit or corporation court, the proper appellate proceeding in this class of cases is by *writ of error* or *supersedeas*. (V. C. 1873, c. 178, § 2.)

An order *discontinuing a road* is within the purview of the foregoing provision, being an order in a controversy *concerning a roadway*. (Senter v. Pugh, 9 Grat. 260.) The order appealed from, however, notwithstanding the comprehensive terms of the provision, must relate to the *establishment* of a road, and not to a collateral controversy concerning the damages occasioned by a road already established. (Hancock v. R. & P. R. R. Co. 3 Grat. 328; Trevillian v. Louisa R. R. Co.; Id. 326.) And although the last mentioned case has hitherto been generally supposed to establish the doctrine that even such orders, in order to warrant an appeal, *must not be interlocutory*, yet in the recent case of Jeter v. Board, 27 Grat. 918 '19, it is determined that the words "*any order*" must embrace *interlocutory* as well as *final* orders, especially in view of the cautious discrimination in other sections of the same chapter between the two classes of orders. (*Ante*, p. 229.)

(2), Where there is a decree or order *in any case in chancery*,—

First, Dissolving an injunction; or

Second, Requiring money to be paid; or

Third, Requiring the possession or title of property to be changed; or

Fourth, Adjudicating the principles of the cause.

In this class of causes the appropriate appellate proceeding is *by appeal*. (V. C. 1873, c. 178, § 2.)

A decree directing *an issue* to be tried by a jury, may, and perhaps generally does, *adjudicate the principles of the cause*; and when it does, an appeal may be allowed from it. (Read v. Cline, 9 Grat. 136.) On the other hand, an order not dissolving an injunction, but *overruling a motion* to dissolve it, can only be appealed from on the ground that it adjudicates the principles of the cause, which it does not necessarily do; but even if it does, it is still *in the discretion* of the appellate court to grant the appeal *immediately*, or to wait for the cause to be further proceeded with. (Lomax v. Picot, 2 Rand. 250 & seq; Talley v. Tyree, 2 Rob. 500; Balt. & O. R. R. Co. v. Wheeling, 13 Grat. 40; Richmond & Y. Riv. R. R. Co. v. Wicker, 13 Grat. 375.)

(3), Where there is in any civil case a *final judgment, decree, or order*.

The appropriate process in this case, if it be in chancery, is an *appeal*; if not in chancery, it is a *writ of error, or supersedeas*. (V. C. 1873, c. 178, § 2.)

Whether a judgment, decree, or order is *final or not*, is sometimes a question of grave perplexity. Appellate process is not unfrequently allowed unadvisedly, when upon more mature consideration by the appellate court, upon the argument of the cause, that court is convinced that the process was premature, the judgment, decree, or order being *interlocutory*, and *not final*, so that nothing remains but to *dismiss the appeal*. (Hughes & ux v. Johnston, 12 Grat. 479; Balt. & O. R. R. Co. v. Wheeling, 13 Grat. 40; Armstrong, &c. v. Pitts, &c., Id. 285; Humphrey v. Foster, Id. 653.)

The general doctrine is that any decree or order is final which *disposes of the whole subject*, gives all the relief that was contemplated, provides with reasonable completeness for giving effect to the sentence, and leaves nothing to be done in the cause, save to superintend ministerially the execution of the decree. (Cocke v. Grilpin, 1 Rob. 20, 46; Harvey v. Bramon, 1 Leigh, 108; Ruff v. Starke, 3 Grat. 129; Vanmeter v. Vanmeter, 3 Grat. 142; Fleming v. Bolling, 8 Grat. 292; Ambrouse v. Keller, 22 Grat. 774 & seq; Rogers v. Strother, 27 Grat. 417; Scott v. Hore, 1 Hughes' U. S. Circ. Ct. R. 167-'8.) But even this test is not always easy to apply practically. It can only be done by

contemplating examples of decrees, judgments, and orders which have been deemed respectively final, and not final. Thus, an award settling the controversy, being adopted by the court as its decree, was determined to be final. (Davis v. Crews, 1 Grat. 407.) And a judgment of a circuit court, reversing a final judgment of a county court, and retaining the cause for a new trial, is a *final judgment*, (Brumbaugh v. Wissler, 25 Grat. 463; Crawford v. Valley Bk. Co. 25 Grat. 467; Lewis', &c. Case, 25 Grat. 938); whilst a decree for a certain quantity of land to be laid off from a larger tract by the surveyor, and he to report his proceedings to the court, was held *to be not final*. (Higginbotham v. Brown, 22 Grat. 323; Young v. Skipwith, 2 Wash. 300.)

4^c. Mode of Instituting and Conducting Appellate Proceedings; W. C.

1^d. Suspension of Execution pending Application for Appellate Process.

At the instance of any person who desires to present a petition for appellate process, whether appeal, writ of error, or *supersedeas*, the court in which the judgment, decree, or order complained of is, may, during the term at which it was rendered, or made, or the judge of the court may, within sixty days after such term ended, make an order suspending the execution of such judgment, decree, or order, for a reasonable time, to be specified in the suspending order, when the applicant shall give bond before the clerk of the court in such penalty as the court or judge shall require, with a condition providing for the payment of all such damages as any person may sustain by reason of such suspension, in case a *supersedeas* to such judgment, decree, or order should not be allowed, and be effectual within the time specified. (V. C. 1873, c. 178, § 4.)

2^d. Making up the Record.

The petition for any appellate process must be accompanied, as we have seen, by a transcript of the record, or at least of so much of it as will enable the court or judge to whom the petition is presented, properly to decide whether the process should be granted or not, and if the petition for the process is granted, to enable the appellate court to determine the questions arising in the cause. The person intending to petition is to notify the opposite party or his counsel of his intention, and so much of the record is to be copied as either may desire, except merely formal and immaterial parts, although at the instance of the petitioner, or upon a writ of *certiorari* from the court, a complete and literal copy may be obtained. (V. C. 1873, c. 178, § 5 to 7; Acts 1876-'7, p. 70, c. 88.)

3^d. Petition for Process of Appeal.

A petition for an appeal, writ of error or *supersedeas*, is required to *assign errors*; and it shall not be presented until some counsel or attorney of the appellate court shall certify that, in his opinion, it is proper that the decision should be reviewed by such court. (V. C. 1873, c. 178, § 8.)

The petition may be presented to the court wherein the case is to be docketed, if the process be allowed, or to a judge thereof, or if the judgment, decree or order be of a county court, to *any circuit judge*. (V. C. 1873, c. 178, § 9.) The petition shall be rejected when it is for an appeal from an interlocutory decree or order, (in cases where appeals are allowed from such decrees, &c. *Ante*, p. 859-'60), when it is deemed most proper that the case should be proceeded with further before an appeal is allowed; and so it shall be rejected when the court or judge shall deem the judgment, decree or order, *plainly right*. And if, rejecting it on this latter ground, the order of rejection shall so state, no other petition shall afterwards be presented for the same purpose, except to an appellate court or judge thereof, founded on such rejection. (V. C. 1873, c. 198, § 10.)

4^d. Terms on which Appellate Process is granted.

The court or judge to whom the petition is presented, if of opinion that the decision complained of *ought to be reviewed*, may allow an appeal, writ of error, or *supersedeas*; and in a case of appeal (as well as of *supersedeas*), may award a *supersedeas* to stay proceedings, either in whole or in part. (V. C. 1873, c. 178, § 11.) The process is allowed however, only on reasonable terms, namely: that except where it is proper to protect the estate of a decedent, convict, or insane person, not until the appellants, or one of them, or some other person, give a bond in a penalty to be *fixed* by the court or judge allowing the process, with condition, if a *supersedeas* be awarded, to perform and satisfy the judgment, decree or order, in case it be affirmed or the process of appeal be dismissed, and also to pay all damages, costs and fees, which may be awarded against or incurred by the appellants; and if it be an appeal from an order or decree dissolving an injunction, or dismissing a bill of injunction, with a further condition to indemnify the surety in the injunction-bond against all loss or damage in consequence of his suretyship; and with condition where no *supersedeas* is awarded, to pay such specific damages, and such costs and fees as may be awarded or incurred. (V. C. 1873, c. 178, § 13.)

The appeal-bond is to be taken by the clerk of the appellate court, if that is the circuit court, or if the court of appeals is the appellate court, it is then to be taken by the clerk of the circuit or corporation court below, the clerk of the

court of appeals endorsing on the process what bond is required. (V. C. 1873, c. 178, § 14, 15.)

5^d. Limitation to Proceedings by way of Appeal.

No appellate process is to be allowed to or from a *final judgment*, decree, or order, if, when the record is delivered to the clerk of the appellate court, there shall have elapsed *two years* since the date of such final judgment; and if allowed, the process shall be dismissed as soon as the fact is made apparent that the two years have elapsed. If, however, the judgment, &c., was rendered before November 5, 1870, the limitation is *two years, nine months and ten days*.

After those periods respectively, therefore, no error, however manifest, can in general be corrected. (V. C. 1873, c. 178, § 17; Callaway v. Harding, 23 Grat. 542, 549; *Ante*, p. 852-'3.)

6^d. Mode of Proceeding in the Appellate Court;

W. C.

1°. Mode of Proceeding *in the Circuit Courts* upon Appeal, &c.

The mode of proceeding upon appeal, &c., in the circuit court is extremely simple and informal. When the process of appeal has been duly served upon the defendant in error, at some convenient time during the next following term (unless a continuance for good cause be granted), the case is argued upon the errors suggested in the petition, and the record being inspected and duly considered, the court pronounces its judgment; and whether it affirm or reverse the judgment of the county court, it does not remand the cause to that court for further proceedings, but retains it in the circuit court, there to be proceeded in, unless, by consent of parties, or for good cause shown, the circuit court direct otherwise. (V. C. 1873, c. 178, § 25.)

2°. Mode of Proceeding *in the Court of Appeals*; W. C.

1st. The Printing of the Record.

In every case docketed in the court of appeals, the clerk of the court where the case is docketed, shall cause a table of contents of the record (to be prepared by himself), the petition, and so much of the record as the counsel for any party interested, or the court may direct, to be printed, to the number of twelve copies, unless a larger number be ordered by the court; one to be delivered to each judge, two to the counsel on each side, one to be retained in the clerk's office, one to be transmitted to the clerk of the court below, and one to be delivered to the reporter of the court's decisions; the cost of the printing is to be paid out of the State Treasury, (V. C. 1873, c. 178, § 19), to be repaid to the commonwealth, however, by the appellant, and to be recovered finally by the party substantially prevailing. (V. C. 1873, c. 180, § 12.)

2^d. The Docketing of Appeals.

Cases pending in the court of appeals are to be docketed by the clerk, before each session of the court, in the order in which they were matured, and are in general to be heard in that order; but the court, in its discretion, may hear, *out of turn*, cases concerning the probate of a will, or the appointment or qualification of a personal representative, guardian, curator, or committee; or concerning a mill, roadway, ferry or landing, and *any others* which it may see good cause for so hearing. (V. C. 1873, c. 178, § 21.)

It must be observed, that it is the duty of the clerk of the court, where the appeal is docketed, to issue the necessary summons to the parties interested to answer the complaint of the plaintiff in error; and also to issue whatever process of appeal is required, as (*e. g.*) any *supersedeas* which may be awarded. (V. C. 1873, c. 178, § 12.)

3^d. The Grounds of Decision in the Appellate Court.

In general, the grounds of decision in the appellate court are *such only as appear in the record*, the record being regarded as the exclusively authentic history of the cause; and it is believed, that in the court of appeals this doctrine admits of *no exception*. In the circuit court, there are two cases where the court may look to matters extrinsic to the record, namely, not only in the *audita querela*, which in this aspect may be left out of view, (*Ante*, p. 846, &c.), but in the writ of error *coram vobis*, where extrinsic proof of the irregularity in the proceedings complained of may be, and indeed *must be*, adduced; and in *will, mill, road and ferry cases*, &c., where a right of *arbitrary appeal* exists, in which case witnesses may be examined in the *circuit court*. (V. C. 1873, c. 178, § 1, 2.)

In the court of appeals it is said, that a writ of error *coram vobis* does not lie, (*Reid v. Strider*, 7 Grat. 76); and the statute expressly declares, that *in no case* shall the court of appeals hear parol testimony. (V. C. 1873, c. 178, § 22.)

4^d. Decision of the Appellate Court,—the Registry and Execution thereof.

Where there is no error in the judgment, decree, or order complained of, it is, of course, to be affirmed by the appellate court, which, on the other hand, is to reverse the same in whole, or in part, if erroneous, and to enter such judgment, decree, or order, as the court below ought to have entered, *affirming* in those cases where the voices on both sides are *equal*. But in order to declare in any case, any law null and void by reason of its repugnance to the

Federal Constitution, or the Constitution of Virginia, a majority of the judges elected to the supreme court must concur. (Va. Const. 1869, Art. VI, § 2.)

This last provision grows out of a misconception of the functions of the judiciary, with respect to the constitution. The judges are no more the guardians of the constitution, than of any other law. In the administration of justice, they are obliged to determine what is the law of the land, and if laws conflict, to ascertain which shall prevail, and to do this in every case which is presented to them, with due regard to the precedents which they, or their predecessors or other courts, have established. They do not sit to determine *in the abstract*, the meaning of laws, nor to fix their relative or absolute validity, but to *decide causes* between man and man. If an ordinary act of the Legislature is repugnant to the organic law of the State, of course the organic law must prevail, and the judge upon his tribunal must so pronounce, because he cannot otherwise administer justice according to law; but notwithstanding, *as between the parties*, the decision of a supreme court is *final and conclusive*, yet the judge does not thereby invalidate the law *per se*, as to other departments of the government. He and his fellows may, and probably will, adhere to the opinion thus formed with deliberation, and solemnly and publicly announced and acted upon, when the same question arises in other cases; and, therefore, so far as it depends on the judiciary to enforce the act in question, it must remain inoperative and of none effect. Nor can it be denied that upon such questions, the opinions of eminent judges, relating to inquiries which they are peculiarly competent from education, training, and experience to conduct, formed and delivered under the sanctions of judicial duty, are entitled to and must receive in the nature of things, the most respectful consideration. But there is no *constitutional obligation* on other persons in authority to submit implicitly to the views of the judges, where such persons have, by the constitutional organization of the government, the means to give effect to the adverse sentiments which they may entertain, without recourse to the judiciary. The judges exercise *no veto power*. It is only *incidentally*, in the discharge of their judicial functions, that they are constrained to pronounce whether or not there is a conflict between the lesser and the greater law, and if the lesser law is liable thereby to become thenceforward a dead letter, that is a casual and accidental result, inevitable perhaps, but not expressly designed.

Seeing then, that the judges do not constitute a great council of State, with a negative upon all acts of the

Legislature which they suppose to be repugnant to the constitution, whereby to all intents and purposes, and *in the abstract*, such acts are absolutely invalidated; but are appointed to decide between man and man, upon the dearest rights of person and property; with what propriety shall the course of justice *between citizens* be obstructed, and indefinitely delayed, because, in order to determine the particular case, it is necessary to ascertain whether or not an act of the Legislature is in accord with the fundamental law, and although a majority of a duly constituted court are prepared to pronounce judgment, yet not being a majority of *all the judges elected*, no judgment can be delivered?

The opinions of less than a majority of the whole court are never in any case regarded as *settling an important principle*, even in the same court; but were it otherwise, particular cases of individuals ought not to be delayed in order to *settle principles*. Judges sit, as already remarked, to decide causes, and not primarily to determine doctrines of law. *That* is merely incidental, and ought never seriously to interfere with the first, direct and general object. See Cool. Const. Lim'ns, 41 & seq.

To state the various circumstances under which an appellate court ought to affirm or reverse the determination of the court below, is not a fit topic for an elementary work. A brief exposition, however, of some of the prominent principles by which appellate courts are guided seems indispensable in order to enable the student to comprehend, and the practitioner to conduct, proceedings in those courts. It will be admitted that the doctrines upon the subject are, in the main, eminently equitable and rational, and that the courts have honestly sustained the legislature in the effort to divest the final scenes in the drama of justice as much as in the nature of things is practicable, of all pedantic subtleties, and of technicalities which obstruct the right.

It will be remembered that, in speaking formerly of the motion in arrest of judgment (*Ante*, p. 765 & seq), the nature and import of the statute of *jeofails* was described at some length. We saw there that our statute of *jeofails and amendments* (V. C. 1873, c. 177, § 3 & seq), aims at two objects, (1), The *disregarding of certain errors*, which do not affect the essential merits of the cause; and (2), The *actual amendment of certain other mistakes in the court where they occur*, without the expensive and dilatory process of removal of the cause to a higher tribunal. It is to the first of these two branches of the statute in question to which our attention is to be now principally directed. In respect to the second, the student is at present only asked

to bear in mind that the statute provides (V. C. 1873, c. 177, § 5, 6), that no error capable of being amended in the inferior court under § 5, shall be ground for any appellate process, until a motion to amend has been made and overruled in the lower court.

"No judgment," says the statute, "shall be *stayed* (that is, *arrested*), or *reversed* (that is, by means of appellate process in a higher court), for

1. The appearance of either party, being *under the age of twenty-one years*, by *attorney*, if the verdict (when there is one), or the judgment, *be for him, and not to his prejudice*; or

2. For want of *warrant of attorney*; or

3. For the want of a *similiter*, or any *misjoining of issue*; or

4. For *any informality in the entry of the judgment* by the clerk; or

5. For the *omission of the name of any juror*, or because it may not appear that the verdict was rendered *by the number of jurors* required by law; or

6. For *any defect, imperfection, or omission in the pleadings* which could not be regarded on demurrer, or for any other defect, imperfection or omission, which might have been *taken advantage of on a demurrer*, but was *not so taken advantage of*." (V. C. 1873, c. 177, § 3.)

The arresting and reversing of judgments are by this statute put upon the same footing; and hence, it is the received doctrine that any cause for arresting a judgment is cause also for reversing it. (Mathew's Case, 18 Grat. 989.) It may be added that in the United States courts the want of a joinder of issue, by the omission of a replication to a special plea, where the parties have proceeded in the inferior court as if the pleadings were perfect, is not a ground for reversing the judgment. (Laber v. Cooper, 7 Wal. 569-70.) And on the other hand it is held, even under the comprehensive statute above set forth, that where *no case at all* appears in the pleadings the error is not cured, but the judgment is to be reversed. (Ross v. Milne, & ux, 12 Leigh, 217; Old's Case, 18 Grat. 915.)

It is a proposition which meets us at the threshold of the discussion, that an appellant cannot complain of irregularities in the court below for which he is himself accountable, nor for errors of his own committing. (Carpenter v. Utz, 4 Grat. 270; Howery v. Helms, 20 Grat. 1; Avendano v. Gay, 8 Wal. 376.) Nor can he complain of errors which are beneficial to him, nor even of those which are not injurious, provided it *clearly* appear that they did not, nor under the circumstances could, prejudice his interests.

(*Ross v. Gill*, 1 Wash. 87; *Pate v. Spotts*, 6 Munf. 396; *Eib v. Pindall*, 5 Leigh, 109; *Morris v. Morris*, 4 Grat. 293; *Crawford v. Morris*, 5 Grat. 90; *Vance v. McLaughlin*, 8 Grat. 389; *Early v. Wilkinson*, 9 Grat. 68; *Johnson v. Jennings*, 10 Grat. 1; *Stainback v. Bank of Virginia*, 11 Grat. 266-'7; *Colvin v. Menefee*, 11 Grat. 87; *Clark v. Reins*, 12 Grat. 98; *Harvey v. Epes*, 12 Grat. 153; *Franklin v. Depriest*, 13 Grat. 257; *Carrington v. Goddin*, 13 Grat. 587; *Blackwell v. Patton*, 7 Cr. 471; *Campbell v. Pratt*, 2 Pet. 354; *Greenleaf v. Birth*, 5 Pet. 132; *Deery v. Gray*, 5 Wal. 807; *Bethell v. Matthews*, 13 Wal. 1.)

In chancery proceedings, if the cause appears to be not proper for the jurisdiction of a court of equity at all, although no objection be made on that account in the court below, by plea, demurrer, or otherwise, the appellate court must dismiss the bill, (*Morgan v. Carson*, 7 Leigh, 738; *Tapp v. Rankin*, 9 Leigh, 478; *Hudson v. Kline*, 9 Grat. 379; *Green v. Massie*, 21 Grat. 362); but if some other court of equity prove to have jurisdiction, rather than that where the suit is instituted, a plea in abatement—or rather *to the jurisdiction*—is necessary, and the objection is not available if first taken at the hearing in the court below, and much less if taken for the first time in the appellate court. (V. C. 1873, c. 167, § 20; *Jones v. Bradshaw*, 16 Grat. 355.) A similar distinction is observable in the law courts. An objection to the *local* jurisdiction of the particular court must be taken, as we have seen, by plea to the jurisdiction, filed at the same rules at which the declaration is filed, (V. C. 1873, c. 167, § 20); but that supposes that the declaration shows on its face proper matter for the court's jurisdiction, so that if it appears that the matter is not under any circumstances cognizable in *any law court*, it is fatal on writ of error. (*Ross v. Milne*, 12 Leigh, 204.)

A distinction founded in like reason, occurs in the courts of the United States, which from their peculiar constitution as courts of limited cognizance, are bound to decline jurisdiction, if their want of it, in respect to *the subject-matter*, appear in any manner, or in any stage of the cause, whilst want of jurisdiction, in respect to *the parties*, is waived by appearance and pleading to the merits. (*Capron v. Van Noorden*, 2 Cr. 126; *Brown v. Keene*, 8 Pet. 115; *Jackson v. Ashton*, 8 Pet. 149; *Rhode Island v. Massachusetts*, 12 Pet. 718; *Scott v. Sandford*, 19 How. 427 & seq; *Barney v. Baltimore City*, 6 Wal. 280; *Mail Co. v. Flanders*, 12 Wal. 130.)

If no process be served on a defendant, and he notwith-

standing, appears and pleads to the merits, he is fairly before the court, and cannot complain upon appeal, of the irregularity which has occurred. If, however, he has not been summoned, and is not returned as summoned, and does not appear, the judgment at common law, and as is believed with us, is void as to him. (*Wynn v. Wyatt*, 11 Leigh, 591, 594; *Hickom v. Larkey*, 6 Grat. 211-'12.) Under section six, however, of the statute above cited, (V. C. 1873, c. 177), it is held, that the proper course for him to pursue, in order to vacate the judgment, or at least, if others have been joined with him in the action, the proper course for them, is to apply to the inferior court to correct the error; and until such application is made and overruled, the appellate court will not take cognizance of the case in that aspect. (*Gunn v. Turner*, 21 Grat. 384.)

The want of *necessary* proper parties is ground for the reversal of a judgment or decree, although it was not noticed in the court below. (*Taylor v. Spindle*, 2 Grat. 44; *Richardson v. Davis*, 21 Grat. 706; *Bird v. Bird*, 21 Grat. 712; *Armentrout v. Gibbons*, 25 Grat. 371; *Dabney v. Preston*, 25 Grat. 838.) But it is not so as to *merely formal* parties, the omission of whom is no ground for reversal. (*Jas. Riv. & K. Co. v. Littlejohn*, 18 Grat. 53; *Jones v. Tatum*, 19 Grat. 720.) It is competent, however, to the appellate court, and proper for it to introduce such formal parties, and to affirm the judgment or decree. (*Hale v. Horne*, 21 Grat. 112.)

The continuance of a cause to another term of the court, is a matter peculiarly within the discretion of the court below, and the United States courts hold it, as they hold *all other matters of discretion*, to be no ground upon which error can be imputed, of which sundry instances will presently be cited. In Virginia the ill exercise of the discretion may be a ground of error; but it is a well established principle, that the appellate court will only reverse a judgment for that cause, when the refusal of the continuance is *plainly erroneous*; and so in other cases of discretion, as in the second examination of witnesses, &c. (*Brooks v. Wilcox*, 11 Grat. 411; *Hewitt's Case*, 17 Grat. 627; *Fant v. Miller*, 17 Grat. 187; *Wright v. Rambo*, 21 Grat. 158; *Harman v. Howe*, 27 Grat. 676.)

The established doctrine in the United States courts is, that no exercise of a discretionary function is ground of exception, that is, neither in the case of a continuance, nor of the grant or refusal of a new trial, nor of the opening or conclusion of the cause, nor any other such like case. (*Mar. Ins. Co. v. Hodgson*, 6 Cr. 206; *Phil. & Tr. R. R. Co. v. Stimpson*, 14 Pet. 448; *Sims v. Hundley*, 6 How.

1; Day v. Woodworth, 13 How. 363; Doswell v. De la Lanza, 20 How. 29; Spencer v. Lapsley, 20 How. 267; Johnston v. Jones, 1 Bl. 210; Pomeroy v. Bill of Inda. 1 Wal. 592; Cook v. Burnley, 11 Wal. 689.)

For obvious reasons the appellate court can take no cognizance of errors disclosed in the record of a cause, so far as they relate to parties who do not appeal. As to one not appealing the proceeding is *coram non judice*, and hence, it is a principle never departed from, that no decree or judgment is to be reversed as respects a party not appealing, unless his interests are *identical* with those of a party who does appeal, so that the one represents the other, and both are inseparably united. (Tate v. Liggat, 2 Leigh, 84; Dickinson v. Davis, 2 Leigh, 401; Anderson v. De Soer, 6 Grat. 363; Lenow v. Lenow, 8 Grat. 349; Walker v. Page, 21 Grat. 636.)

When, upon a survey of the whole record, a judgment or decree appears clearly to be substantially right, it ought to be affirmed, notwithstanding upon some particular point, not affecting the general merits, it may be open to question. (Faulcon v. Harris, 2 H. & M. 556-'7; Davis v. Miller, 1 Call. 127; Handley v. Snodgrass, 9 Leigh, 484; Wilson v. Spencer, 11 Leigh, 261; Williamson v. Howard, 2 Rob. 39; Powell v. Manson, 22 Grat. 177; Danville Bank v. Waddill, 27 Grat. 448.) And if thus substantially right, it ought to be affirmed, although the inferior court may have given an erroneous reason for its judgment. (Newell v. Wood, 1 Munf. 555; Easley v. Craddock, 4 Rand. 423; Silsby v. Foote, 14 How. 219.) But whilst a judgment or decree may be found in substance correct, the record may disclose some formal defect in the proceedings, and in that case the appellate court ought to supply such defect, if in the nature of things it can be supplied; but whether supplied or not, the judgment should be affirmed. (Heffner v. Miller, 2 Munf. 43; Mayo v. Purcell, 3 Munf. 243; Lyons v. Gregory, 3 H. & M. 237; Brook v. Shelbey, 4 H. & M. 266; Kent v. Matthews, 12 Leigh, 590; Kyle v. Kyle, 1 Grat. 526; Kee v. Kee 2 Grat. 116). A judgment for an amount which the record ascertains to be too great will be reversed, and supposing the record to disclose the true sum, the proper judgment will be entered by the appellate court. (Bowyer v. Hewitt, 2 Grat. 193, Lewis v. Arnold, 13 Grat. 454); and in general the appellate court should not content itself with merely reversing the judgment or decree of the inferior court, but as far as the materials are supplied by the record (which is the sole and exclusive history of the cause), it should give such sentence as ought to have been given in such lower court, either by

dismissing the suit, by directing a new trial, or by awarding a repleader, and the like; or in equity, by modifying the decree as justice may require. (Smith v. Walker, 1 Wash. 135; Mantz v. Headly, 2 H. & M. 308; Blane v. Sansum, 2 Call. 495; Darby v. Henderson, 3 Munf. 115; Bowyer v. Giles, & T. P. Co. 9 Grat. 109; Williamson v. Goodwyn, 9 Grat. 593; Boyce v. Smith, 9 Grat. 704; Tazewell v. Saunders, 13 Grat. 354; Marks v. Hill, 15 Grat. 400; O. & A. R. R. Co. v. Fulvey, 17 Grat. 366; Graham v. Pierce, 19 Grat. 128; Kraker v. Shields, 20 Grat. 377; Muller v. Bayley, 21 Grat. 521; Ewart v. Saunders, 25 Grat. 203; Mott v. Carter, 26 Grat. 127.)

Objections in respect to matters of fact and of proceeding, which might have been obviated if they had been made in the court below, cannot first be presented in an appellate court, nor do they constitute ground for reversal of judgments and decrees. (Brockenbrough v. Blythe, 3 Leigh, 619; Duff v. Duff, 3 Leigh, 523; Colgin v. Henley, 6 Leigh, 86; Poindexter v. Green, 6 Leigh, 504; Foreman v. Murray, 7 Leigh, 412; Rose v. Burgess, 10 Leigh, 186; Kee v. Kee 2 Grat. 116; Jesse v. Parker, 5 Grat. 573; Houghton v. Jones, 1 Wal. 702; Bush v. Campbell, 26 Grat. 403; Peters v. Neville, 26 Grat. 549.) And when the correctness of the sentence pronounced by the inferior court depends on weighing and comparing the evidence in the cause, and on the inferences proper to be drawn therefrom, the appellate court is bound peculiarly to respect the verdict and judgment below, because the jury and the judge who presided at the trial had better opportunities than the appellate court, by reason of their seeing and hearing the witnesses, of arriving at the real truth of the matters in controversy. (Mairs v. Gallahue, 9 Grat. 94; Richmond, F. & Pot. R. R. Co. v. Snead, 19 Grat. 354.)

Where the judgment and action of the court below is *definite*, and is *intelligibly presented* in the record, and does not appear from the record to be wrong, it is presumed to be right, according to the ordinary rule at once of law and of good sense,—“*omnia præsumuntur rite et solenniter esse acta, donec probetur in contrarium*,”—all acts are presumed to be rightly done until the contrary appears, (Broom's Max. 729; 1 Th. Co. Lit. 17); and is consequently to be affirmed. (Noel v. Sale, 1 Call. 495; Horne v. Richards, 2 Call. 507; Ross v. Colville, 3 Call. 282; Hume v. Beale, 3 Munf. 266; Bowyer v. Hewitt, 2 Grat. 193; Pollard v. Lively, 2 Grat. 216; Thomas v. Dawson, 9 Grat. 364; Cooper v. Hepburn, 15 Grat. 551; Coffman v. Sangston, 21 Grat. 263; Jas. Riv. & Kan. Co. v. Adams, 17 Grat. 427; Mitchell v. Thornton, 21 Grat. 164; Shue v. Turk,

15 Grat. 256; Forrer v. Coffman, 23 Grat. 871; Buchanan v. King, 22 Grat. 414; Markham v. Boyd, 22 Grat. 544.) Hence the discharge of a jury before they have agreed upon a verdict, the exclusion of pleas or of evidence, the denial of the demand of *view*, such as the statute (V. C. 1873, c. 158, § 871) allows, or any other similar proceedings, will be supposed to be correct and regular, if the contrary does not appear by the record, by means of a bill of exceptions or otherwise. (Hairston v. Medley, 1 Grat. 96; Dye's Case, 7 Grat. 662; Morrisett's Case, 6 Grat. 673; Muire v. Falconer, 10 Grat. 12; B. & O. R. R. Co. v. Woods, 14 Grat. 447; Gunn v. Turner, 21 Grat. 382; Scott v. Lloyd, 9 Pet. 419; Suydam v. Williamson, 20 How. 427; Schuchardt v. Allen, 1 Wal. 359.) Hence also, if no objection appear by the record (as for example, by bill of exceptions,) to have been made in the court below to the excessiveness of damages, or to the scaling or not scaling of the debt, (supposing it payable in "Confederate currency,") or to the mode of bringing the suit or the like, it cannot be brought forward for the first time in the appellate court. (Law v. Law, 2 Grat. 366; Cross v. Cross, 4 Grat. 257; Wynn v. Harman, 5 Grat. 157; Hunt v. Martin, 8 Grat. 578; Tyree v. Donnelly, 9 Grat. 64; Cook v. Hays, 9 Grat. 142; Hill v. Peyton, 22 Grat. 550; Calbreath v. Va. Porcelain Co. 22 Grat. 697; Symth v. Sutton, 24 Grat. 191; Chapman v. Shepherd, 24 Grat. 277.) And so an objection to a deposition for irregularity *in the taking of it*, as for insufficient notice, &c., comes too late at the trial of the cause, and *a fortiori* in the appellate court; but to the *competency* of the witness as exhibited by facts in the record, or to the character of the testimony as *hearsay*, &c., objection may be made in the appellate court, although never presented before; and if the objection be made in the lower court, on the first ground, namely, of irregularity *in the taking*, and be there overruled, the bill of exceptions thereupon taken ought to state the ground of the objection, or else it cannot be noticed in the court above. And if no opinion upon such an objection to the deposition be expressed by the lower court, the objection is presumed to have been waived. (1 Rob. Pr. (1st ed.) 336-'7; Barker v. Barker, 2 Grat. 343; Fant v. Miller, 17 Grat. 227-'8; Statham v. Ferguson, 25 Grat. 38; Scott v. Cook, 4 Monr. (Ky.) 280.)

This principle it is which makes it indispensable that, when a party complains that the court below has improperly admitted or excluded evidence, or improperly rejected pleas, or other pleading, his bill of exceptions should make it distinctly to appear what the evidence was that was

so admitted or excluded, and what was the pleading rejected, and that the evidence and the pleading were respectively relevant and material, and that the court erred in its action. If the bill of exceptions do not make all these things to appear, the judgment must be affirmed. (*Ante*, p. 746; *Carpenter v. Utz*, 4 Grat. 270; *Johnson v. Jennings*, 10 Grat. 1; *Fitzhugh v. Fitzhugh*, 11 Grat. 300; *James River & Kanawha Company v. Littlejohn*, 18 Grat. 53; *Steptoe v. Read*, 19 Grat. 1; *Bell v. Alexander*, 21 Grat. 1; *Stoneman's Case*, 25 Grat. 892; *Ventress v. Smith*, 10 Pet. 161; *Ins. Co. v. Weide*, 9 Wal. 667; *Coddington v. Richardson*, 10 Wal. 516; *Generes v. Campbell*, 11 Wal. 193.) But in the United States courts the evidence offered is *presumed*, in the absence of proof to the contrary, to be material and relevant. (*Vance v. Campbell*, 1 Bl. 431; *Haussknecht v. Claypool*, 1 Bl. 435.) But where it has been made to appear that a plea was improperly rejected, or that improper instructions were given, or inadmissible evidence allowed to go to the jury, the appellate court will not, in general, stop to inquire whether or not the erroneous ruling was injurious to the party complaining, but will reverse the judgment. (*Wiley v. Givens*, 6 Grat. 277; *Hopkins v. Richardson*, 9 Grat. 485; *Church v. Hubbart*, 2 Cr. 187; *Smith v. Carrington*, 4 Cr. 62.)

Whilst thus the principle is, that wherever the appellate court can discern definitely what was decided by the court below, it will presume the judgment to be correct, until it is shown to be otherwise; it must be observed that, if the facts are so imperfectly and vaguely stated as not to ascertain what the judgment below was, or ought to have been, it is the practice, as being the safer course, to reverse it. (*Ante*, p. 745; *Barrett v. Tazewell*, 1 Call. 215; *Beattie v. Tabb*, 2 Munf. 254; *Brooke v. Young*, 3 Rand. 106; *Raines v. Philips*, 1 Leigh, 483; *Thompson v. Cumming*, 2 Leigh, 321; *Bowyer v. Chesnut*, 4 Leigh, 1.)

We have seen that the pleadings filed in the cause, the mention of the impannelling of the jury, the verdict, and the judgment, constitute the proper record of every action at law, and, therefore, there is no need of a bill of exceptions to incorporate any of these into the record. (*Rogers v. Burlington*, 3 Wal. 654.) But all other circumstances connected with the case, and especially the incidents occurring at the trial, in order to introduce them into the record (the only accredited history of the cause), must be set down in a bill of exceptions, authenticated as formerly described, by the signature of the judge, and ordered to be made part of the record, which, it must be remembered, is, in the main, conclusive of the verity of its contents. (*Jennings*

v. *The Perseverance*, 3 Dal. 336; *United States v. Hodge*, 6 How. 281-'2; *Providence v. Babcock*, 3 Wal. 240.) Of course, if there is no way of revising the judgment of the court below, a bill of exceptions is superfluous; but all opinions and judgments of an inferior court, which are the subject of revision on appeal, and do not otherwise appear in the record, must be thus incorporated therein, in order to avail. (*York & C. R. R. Co. v. Myers*, 18 How. 246; *Snydam v. Williamson*, 20 How. 427; *Schuchardt v. Allen*, 1 Wal. 359.) And neither the judge's statement of what occurred, nor the entries of the clerk, are a substitute therefor, (*Generes v. Bonnemer*, 7 Wal. 564; *Avendano v. Gay*, 8 Wal. 376; *Young v. Martin*, 8 Wal. 354); nor any agreed statement of the *evidence*, in contradistinction to the *facts proved*; (*Burr v. Des Moines R. R. & Nav. Co.* 1 Wal. 102; *Bk. of Ind'a v. Pomeroy*, 1 Wal. 601-'2; *Thompson v. Riggs*, 5 Wal. 675.) But the judgment may be reversed by the appellate court when founded upon an agreed statement of *facts*. (*United States v. Eliason*, 16 Pet. 291; *Stimpson v. R. R. Co.* 10 How. 329; *Graham v. Bayne*, 18 How. 60); or upon a special verdict or demurrer to evidence, (4 Chit. Gen. Pr. 7 & seq; *Snydam v. Williamson*, 20 How. 435.) This bill of exceptions, as well by the general practice, as by the express direction of our statute, (V. C. 1873, c. 173, § 8), must be *signed* by the judge of the inferior court, before whom the occurrences took place; but it is not needful that it should be under the judge's *seal*, although in Virginia it usually is so, (*Mussina v. Cavazos*, 6 Wal. 355; *Generes v. Campbell*, 11 Wal. 193.)

If it can be seen clearly from the record, that the decision of the inferior court did not affect the actual merits of the case, the erroneousness of the decision is no ground for reversal of the judgment. (*Kincheloe v. Tracewells*, 11 Grat. 587.) Hence, the rejection of a plea does not warrant such reversal, if from the whole case the plea appear *not to be true*, (*Fleming v. Toler*, 7 Grat. 310); nor does the refusal to compel the plaintiff to join in a demurrer to the evidence, where the record shows that he is entitled to recover, (*Boyd v. Cit. Sav. Bank*, 15 Grat. 501); nor a judgment of non-suit, however improper, where the declaration is fatally defective. (*Earheart v. Campbell*, *Hemph. C. O. R.* 48.) And all irregularities stand on a like footing. The judgment will not be reversed therefor, if the record disclose that substantial justice has, notwithstanding, been attained. (*McNew v. Smith*, 5 Grat. 84; *Beery v. Homan*, 8 Grat. 48; *Mairs v. Gallahue*, 9 Grat. 94; *Goddin v. Vaughn*, 14 Grat. 102; *Mustard v. Wohl-*

ford, 15 Grat. 329; Fant v. Miller, 17 Grat. 60; Peshine v. Shepperson, 17 Grat. 472.) And so the judgment will not be reversed because of the admission in the court below of improper evidence upon an *immaterial issue*, (Richardson v. Pr. Geo. Justices, 11 Grat. 190); nor of an erroneous instruction upon an *immaterial point*. (Pitman v. Breckenridge, 3 Grat. 127; Turner v. Fendall, 1 Cr. 118.)

Where the record itself discloses material error on the merits, it is a ground of reversal, although no objection be made on that account in the court below, as in the case of the report of a settlement of accounts by a commissioner in chancery, (Cookus v. Peyton, 1 Grat. 431; Wells v. Dunn, 5 Grat. 384); and as a writ of error brings up the whole record, a review of the decision by the inferior court, of a demurrer to evidence, will make a material defect in the declaration available, unless it be cured by the statute of *jeofails*, (Bank of U. States v. Smith, 11 Wheat. 171; Scott v. Sandford, 19 How. 393; Woodward v. Brown, 13 Pet. 5; Rogers v. Burlington, 3 Wal. 654); and where a first verdict is erroneously set aside, and a judgment pronounced upon a second verdict, the appellate court will reverse that judgment, and enter one on the *first verdict*. (Tyler v. Taylor, 21 Grat. 700.) And in short, whatever material error appears in the record by bill of exceptions, or otherwise, even though it be against the appellee, is ground of reversal. (Boulware v. Newton, 18 Grat. 720; Suydam v. Williamson, 20 How. 428.) Nor does the imperfection of the bill of exceptions, if a substantial error is apparent, prevent that result, (U. States v. Morgan, 11 How. 154); whilst on the other hand, a judgment will not be reversed unless, from the record, it plainly appear to be in some material particular erroneous. (Grayson's Case, 7 Grat. 613; Vaiden's Case, 12 Grat. 717; Mitchell v. Baratta, 17 Grat. 445; Trim's Case, 18 Grat. 983; Welch v. Mandeville, 7 Cr. 152; Stevens v. Gladding, 19 How. 64; Lawler v. Claffin, 22 How. 23; N. Orleans v. Gaines, 22 How. 141; Taylor v. Morton, 2 Bl. 481; Pomeroy v. Bank of Ind'a, 1 Wal. 592.)

To refuse relevant instructions which rightly propound the law, is error in the court below, for which the judgment must be reversed, (Pickett v. Morris, 2 Wash. 255; Brooke v. Young, 3 Rand. 106; Dimmett v. Eskridge, 6 Munf. 311; Wills v. Washington, 6 Munf. 592; Early v. Garland, 13 Grat. 9, 14; Balt. & O. R. R. Co. v. Polly, 14 Grat. 468-'9; Balt. & O. R. R. Co. v. Laffertys, 14 Grat. 486-'7; Smith v. Carrington, 4 Cr. 62); but it is held that the error is cured by a verdict conforming to what the instruction should have been. (Douglass v. Mc-

Allister, 3 Cr. 298.) If, however, the instruction asked for does not correctly propound the law, the court ought to refuse to give it, and is not bound to modify it, or to give any other in its place. (Rosenbaum v. Weeden, 18 Grat. 799.) An equivocal instruction asked for, ought to be made plain by the court before giving it; for either to give or refuse it simply, would tend to mislead the jury. (Balt. & O. R. R. Co. v. Polly, 14 Grat. 447; Peshine v. Shepperson, 17 Grat. 472; Millan v. Kephart, 18 Grat. 1; Rosenbaum v. Weeden, 18 Grat. 799; Ward v. Churn, 18 Grat. 816.) Indeed, any instruction calculated to mislead the jury, whether it arises from ambiguity or any other cause, ought to be avoided, and if given it will oblige the appellate court to reverse the judgment. (Caldwell v. U. States, 8 How. 366; Blackburn v. Crawford, 3 Wal. 176.) As to an instruction on a mere abstract question of law, not arising in the case, or upon a hypothetical case as to which there is no evidence in the cause, it is certainly not error in an inferior court to refuse it, (Buster v. Wallace, 4 H. & M. 82; Caton v. Lenox, 5 Rand. 31; Hamilton v. Russell, 1 Cr. 310; Brooks v. Marbury, 11 Wheat. 78; Tucker v. Moreland, 10 Pet. 58; Clark v. Kownslar, 10 Pet. 657; Rhett v. Poe, 2 How. 457); and it seems to be the better opinion that it is error to give it, because it tends to confound and mislead the jury; (Pasley v. English, 10 Grat. 236; Jas. Riv. & K. Co. v. Littlejohn, 18 Grat. 53; Rea v. Trotter, 26 Grat. 585; U. States v. Breitling, 20 How. 252; Goodman v. Simonds, 20 How. 343; Michigan Bank v. Eldred, 9 Wal. 544; Ward v. U. States, 14 Wal. 28); and if it be not fatal to the judgment, it is because the peculiar circumstances obviate the danger of leading the jury astray. (Poore v. Magruder, 24 Grat. 197.) But where there is *any evidence* tending to make out the supposed case to which the instruction relates, however inadequate in the opinion of the court, or to however little weight it may be deemed entitled, it is best and safest to give the instruction, if it propound the law correctly. (Hopkins v. Richardson, 9 Grat. 485; Farish v. Reigle, 11 Grat. 697, 719; Early v. Garland, 13 Grat. 9.) It is also not error in the court below to refuse an instruction upon the *evidence*, in contradistinction to the *facts proved*, (Patterson v. Jenkes, 2 Pet. 816; Providence v. Babcock, 3 Wal. 240); or as it has been more pointedly expressed, courts will not instruct as to the law upon an entangled mass of evidence, nor take upon them the office of separating the law from the facts; but require of the party who asks their instruction, to put them a precise

question of law, as arising out of the facts. (Brooke v. Young, 3 Rand. 115; Kitty v. Fitzhugh, 4 Rand. 605.)

It need hardly be said that erroneous instructions constitute error, for which the judgment must always be reversed unless they can clearly be shown not to have prejudiced the party complaining thereof. (Berry v. Ensell, 2 Grat. 339; Hopkins v. Richardson, 9 Grat. 501; Church v. Hubbard, 2 Cr. 187; Smith v. Carrington, 4 Cr. 62; Scott v. Lunt, 7 Pet. 607.)

We have seen, that in Virginia, any expression of opinion by the court as to the weight or sufficiency of the *parol* evidence is ground for reversing the judgment, (Keel v. Herbert, 1 Wash. 203; Fisher v. Duncan, 1 H. & M. 563; Fowler v. Lee, 4 Munf. 473; Dabney v. Taliaferro, 4 Rand. 256; McKinlay v. Ensell, 2 Grat. 333); although it is for the most part the province of the court, and its duty, to construe the meaning, and determine the effect of *written documents*. (1 Stark Evid. 525; Herbert v. Wise, 3 Call. 239; Johnson v. Jennings, 10 Grat. 11.) But in the United States courts, as in those of England, comments of the court upon the evidence are allowed, and do not constitute error, if the jury be informed that the opinion of the court as to the evidence, is not binding on them. (Carver v. Astor, 4 Pet. 80; Magniac v. Thompson, 7 Pet. 348; Tracy v. Swartwont, 10 Pet. 80; U. States v. Lamb, 12 Pet. 1; Garrard v. Reynolds, 4 How. 123; Greenleaf v. Birth, 9 Pet. 292; Ches. & O. Can. Co. v. Knapp, 9 Pet. 541.)

The appellate court, when it reverses a judgment, will take care not to jeopard the interests of the appellee farther than the exigences of the case require. Thus, if a judgment of an inferior court sustaining a demurrer to a plea be reversed, no final judgment will be pronounced against the appellee upon the demurrer, but the cause will be remanded, in order to enable him to withdraw his demurrer to the plea, and to reply thereto, if he shall be so advised, (Hamtramck v. Selden, 12 Grat. 28); and so where a judgment overruling a demurrer to the declaration is reversed, the cause will be remanded to the lower court, in order to enable the plaintiff to amend his declaration, if he shall think fit so to do. (Strange v. Floyd, 9 Grat. 474; Fitzhugh v. Fitzhugh, 11 Grat. 300.) And generally a wrong judgment overruling a demurrer to pleadings, setting aside a demurrer to evidence, or granting a new trial, notwithstanding subsequent proceedings may have been had, will be reversed, and judgment entered on the demurrer to pleading, or on the demurrer to evidence, or on the original verdict. (Knox v. Garland, 2 Call. 241; Creel v. Brown,

1 Rob. 265 ; Howel v. Alexander, 3 Rand. 94 ; Jones v. Raines, 4 Rand. 386.) But it must be observed, that if, after judgment is pronounced overruling a demurrer, the demurrer is *withdrawn*, the objection contained in it is thereby wholly waived, and the demurrant cannot complain in an appellate court, of the overruling of the demurrer. (Hopkins v. Richardson, 9 Grat. 485.)

We have seen how peremptory is the rule that a bill of exceptions to the grant or refusal of a new trial must set forth *the facts which the court conceives to be proved*, and not merely the *evidence tending to prove them* ; and that, therefore, where the evidence is conflicting, the court may, for that reason, decline to certify *the facts* at all. (Bennett v. Hardaware, 6 Munf. 125 ; Taliaferro v. Franklin, 1 Grat. 332 ; Grayson's Case, 6 Grat. 712 ; Vaiden's Case, 12 Grat. 717 ; Forkner v. Stuart, 6 Grat. 197 ; Harnsberger v. Kinney, 6 Grat. 287 ; Bull's Case, 14 Grat. 613 ; Wash. & N. O. Tel. Co. v. Hobson, 15 Grat. 122 ; Gimmi v. Cullen, 20 Grat. 439.) If, despite the rule, *the facts* be not stated, but *the evidence*, the appellate court will either decline to take cognizance of the case at all, or will reject *all the parol evidence* of the exceptor, and give full credence to the evidence of his adversary, and will reverse the judgment only when, *upon that basis*, it appears to be wrong. Ewing v. Ewing, 2 Leigh, 337 ; Green v. Ashby, 6 Leigh, 135 ; Rohr v. Davis 9 Leigh, 30 ; Pasley v. English, 5 Grat. 148 ; Moffett v. Bowman, 6 Grat. 219 ; Noyes v. Humphreys, 11 Grat. 651 ; Farish v. Reigle, 11 Grat. 720 ; Carrington v. Goddin, 13 Grat. 587 ; Clafin v. Steenbock, 18 Grat. 842 ; Gimmi v. Cullen, 20 Grat. 439 ; Read's Case, 22 Grat. 924 ; Brambough v. Wissler, 25 Grat. 463.)

It is proper here again to mention the extraordinary, and as it would seem, anomalous rule which prevails in our courts, forbidding, in general, reference from one bill of exceptions to another, unless such reference be specially made in the later bill, notwithstanding all the bills are *parts of one record* ; although it is permitted to refer to a bill purporting to contain *all the facts in the case*, in connection with other bills filed in the same cause. (Brooke v. Young, 3 Rand. 116 ; Crawford, v. Jarrett, 2 Leigh, 639 ; Perkins v. Hawkins, 9 Grat. 659 ; Wash. & N. O. Tel. Co. v. Hobson, 15 Grat. 132.)

In those cases where a jury is waived, and the cause is submitted to the court, the court is understood in Virginia to occupy, with respect to the matter submitted, the position which it occupies in questions of probate, and causes touching the opening of roads, the establishment of ferries.

and landings, and the erection of mills, and consequently, if the decision is not satisfactory, and it is desired to have it reviewed in an appellate court, the bill of exceptions to the judgment of the court ought to contain, not the *facts*, as was held in *Pryor v. Kuhn*, 12 Grat. 615, but the *evidence* which is to be reviewed in the higher court, it is said, *as if it were a demurrer to evidence*. (*Hodge v. First National Bank*, 22 Grat. 51.) It is submitted, however, whether it is not more consonant to the policy designed by the legislature in allowing the court to be thus substituted by consent for a jury, to look upon the higher court as charged with the consideration of evidence, *as if on appeal*. (*Wickham v. Lewis Martin*, 13 Grat. 446, Opinion of Daniel, J.; Report of Revisors of Code 1849, p. 816.)

When in the United States courts, a jury is thus waived, and the case is submitted by consent to the court, the court acts simply *as referee*, and consequently its determination upon the facts and the law, as in the case of any other referee, is conclusive and final. If any one is aggrieved by the decision, *the facts* deemed by the court to have been proved are to be stated in the manner of a *special verdict*, and the decision is thus to be reviewed in the appellate court. And if evidence be improperly rejected or admitted, that may be brought into the record by a bill of exceptions, as in other cases. (*Field v. United States*, 9 Pet. 202; *Bond v. Brown*, 12 How. 254; *Weems v. George*, 13 How. 197; *Arthus v. Hart*, 17 How. 12, 13; *Graham v. Bayne*, 18 How. 60; *Gould v. Frontin*, 18 How. 135; *Kelsey v. Forsyth*, 21 How. 85; *Barrett v. United States*, 9 Wal. 38; *Kearney's Case*, 12 Wal. 275.)

It must be remembered, that it is an old established principle of the common law, that every exception must be *taken*, that is, the court must be notified that the objector proposes to *save the point*, and the grounds of the objection must be indicated, before the jury retire from the bar to consider the case, and the *record must show* that it was so done, or else the appellate court can take no notice of the matter; because else the judge would be liable to forget, or inaccurately to remember the circumstances to be put in the bill. But whilst there must thus be a notification, and properly a memorandum in writing of the substance, while the thing is transacting, it need not immediately be drawn up in form, which may be done at any time *during the same term*, but not after its termination. (*Bac. Abr. Bill of Exceptions*; *Wright v. Sharp*, 1 Salk. 288; *Wash. & N. O. Tel. Co. v. Hobson*, 15 Grat. 137-'8; *Bradstreet v. Thomas*, 4 Pet. 102; *Sheppard v. Wilson*, 6 How. 275;

Phelps v. Mayer, 15 How. 161; United States v. Breitling, 20 How. 252; Barton v. Forsyth, 20 How. 532; French v. Edwards, 13 Wal. 506.)

The constitution of Virginia provides (Art. VI, § 4,) that where a judgment or decree is reversed or affirmed by the supreme court of appeals, the *reasons therefor shall be stated in writing*, and preserved with the records of the case. And by statute it is enacted, that in those cases which the reporter of the court's decisions is directed to report, copies of the reasons thus stated in writing shall be delivered by the clerk of the court to the reporter. (V. C. 1873, c. 162, § 5.)

When any judgment, decree, or order is affirmed by an appellate court, damages are to be awarded to the appellee, namely, where the judgment, &c., is *for the payment of money*, such interest as the parties are legally entitled to recover, to be computed upon the whole amount of the money, including interest and costs from the time the appellate process took effect until the *affirmance*, or if that be in the court of appeals, until a copy of its decision be entered in the order-book of the court below, which damages are to be in satisfaction of all interest during that time; and when the judgment, &c., is not for the payment of money, except costs, the damages shall be such specific sum as the appellate court may deem reasonable, not being more than \$100, nor in the court of appeals less than \$20. (V. C. 1873, c. 178, § 24.)

When any term of the court of appeals is ended, or sooner if the court so direct, the clerk thereof is required to certify and transmit its decisions to the clerk of the court below, and that court is to enter the decision of the court of appeals as its own, and execution may issue thereon accordingly. And if such decision be received in vacation, the clerk of the court below shall enter it in his order-book, and thereupon such execution may issue, and such proceedings be had as would have been proper had the decision been entered in court. (V. C. 1873, c. 178, § 29.)

The decision of the court of appeals is final and irreversible, *even by itself*, after the end of the term when it is pronounced, at least in respect to questions decided by the court below, (Burton v. Brown's Ex'ors, 22 Grat. 1; J. B. Campbell's Ex'or v. A. C. Campbell's Ex'ors, 22 Grat. 649); nor can any motion, in general, be entertained at a subsequent term to rehear a cause decided at a previous term, when no motion to rehear it was *then submitted*. (Griffin v. Cunningham, 20 Grat. 31.) To these rules a statute has introduced this qualification, that the court of appeals may rehear and review any case decided by the

said court, within *the last fifteen days of the preceding term*; provided that one of the judges who decided the cause adversely to the applicant, shall certify that in his opinion there is good cause for such rehearing. (V. C. 1873, c. 178, § 38.)

To the foregoing long-drawn exposition of the proceedings in an action at law, a complete record in an action, illustrating many of the doctrines and principles which the writer has sought to explain, will be no unfitting pendant.

RECORD.

In an Action of Covenant.

Virginia:

Pleas at the court-house of the county of A., before the circuit court of the said county, on Thursday the — day of — in the year of our Lord eighteen hundred and seventy —:

Declaration. Be it remembered, that heretofore, to wit, at rules held for the circuit court for the said county, in the clerk's office of the said court, on Monday the — day of — in the year of our Lord eighteen hundred and seventy —, came Charles Covenantee, by his attorney, *Filed.* and filed his certain declaration against Christopher Contractor, of a plea of covenant broken; which declaration is in the words and figures following, to wit:

Declaration. Charles Covenantee complains of Christopher Contractor of a plea *St. Pl. 36;* of covenant broken for this, to wit: that heretofore, to wit, on the *Id. (Tyler),* — day of —, in the year of our Lord eighteen hundred and 68. seventy —, at the said county of A., by a certain indenture then and there made by the said plaintiff of the one part, and the said defendant of the other part, (one part of which said indenture, sealed with the seal of the said defendant, the said plaintiff now brings here into court, the date whereof is the day and year aforesaid), the said plaintiff, for the consideration therein mentioned, did demise, lease, and to farm let unto the said defendant, a certain messuage or tenement, and other premises, in the said indenture particularly specified, to hold the same with the appurtenances, to the said defendant, his executors, administrators and assigns, from the — day of —, next ensuing the date of the said indenture, for and during, and unto the full end and term of seven years, from thence next ensuing, and fully to be complete and ended, at a certain rent payable by the said defendant to the said plaintiff, as in the said indenture is mentioned. And the said defendant, for himself, his executors, administrators and assigns, did thereby covenant, promise and agree to and with the said plaintiff, his heirs and assigns, (amongst other things,) that he, the said defendant, his executors, administrators and assigns, should and would at all times during the continuance of the said demise, at his and their own costs and charges, support, uphold, maintain and keep the said messuage or tenement and premises in good and tenantable repair, order and condition; and the same messuage or tenement and premises, and every part thereof, should and would leave in such good repair, order and condition, at the end or other sooner determination

of the said term, as by the said indenture, reference being thereunto had, will among other things fully appear. By virtue of which said indenture, the said defendant afterwards, to wit, on the — day of —, in the year aforesaid, and at the said county of A. entered into the said premises with the appurtenances, and became and was possessed thereof, and so continued until the end of the said term. And although the said plaintiff hath always, from the time of making the said indenture hitherto done, performed, and fulfilled all things in the said indenture contained, on his part to be performed and fulfilled; yet, the said plaintiff saith that the said defendant did not, during the continuance of the said demise, support, uphold, maintain and keep the said messuage or tenement and premises in good and tenantable repair, order and condition, and leave the same in such repair, order and condition at the end of the said term; but for a long time, to wit, for the last three years of the said term, did permit all the windows of the said messuage or tenement to be, and the same during all that time were, in every part thereof, ruinous, in decay, and out of repair, for want of necessary reparation and amendment. And the said defendant left the same, being so ruinous, in decay, and out of repair as aforesaid, at the end of the said term, contrary to the form and effect of the covenant so made as aforesaid. And so the said plaintiff saith, that the said defendant (although often requested) hath not kept the covenant so by him made as aforesaid, but hath broken the same; and to keep the same with the said plaintiff, hath hitherto wholly refused, and still doth refuse, to the damage of the said plaintiff of \$—, and thereupon he brings his suit.

Common Order.

Whereupon the said defendant being duly summoned, and not appearing, on the motion of the plaintiff, by his attorney, it is ordered that judgment be entered for the plaintiff against the said defendant, for what damages the said plaintiff hath sustained by occasion of the breach of covenant in the said declaration mentioned, unless the said defendant shall appear and plead at the then next rules.

Office Judgment.

And at another day, to wit: at rules held at the clerk's office of the said circuit court, on Monday, the — day of —, in the year aforesaid, the said defendant still failing to appear and plead, on motion of the plaintiff, by his attorney, it is ordered that the last order made against the said defendant, in this cause, be confirmed; and that the plaintiff's damages be ascertained by a jury at the then next term.

Writ of Inquiry.

And at another day, to wit: at a circuit court held for the said county of A., at the court-house thereof, on Thursday, the — day of —, in the year aforesaid, (till which time the cause aforesaid remained undetermined, and was continued by virtue of the Act of Assembly in that case made), came as well the plaintiff, by his attorney, as the defendant, by his attorney, and on the motion of the said defendant, it is ordered that the judgment obtained in the office against him be set aside. And thereupon the said defendant, by his attorney, comes and says, that after the said breach of covenant in the declaration mentioned, and before the commencement of this suit, to wit, on the — day of —, in the year of our Lord eighteen hundred and seventy —, at the said county of A., the said plaintiff, by his certain deed of release, sealed with his seal, and

*Office Judgment set aside.
Plea of Release.*

now shown to the court here, (the date whereof is the day and year last aforesaid,) did remise, release, and forever quit claim to the said defendant, his heirs, executors, and administrators, all damages, causes of action, breaches of covenants, debts and demands whatsoever, which had then accrued to the said plaintiff, or which the said plaintiff then had against the said defendant; as by the said deed of release, reference being thereunto had, will fully appear. And this the said defendant is ready to verify.

Replication.
Duress.

And the said plaintiff, as to the said plea of the said defendant, by him above pleaded, says, that the said plaintiff, at the time of the making of the said supposed deed of release, was unlawfully imprisoned, and detained in prison by the said defendant until, by force and duress of that imprisonment, he, the said plaintiff, made the said supposed deed of release, as in the said plea mentioned. And this the said plaintiff is ready to verify.

Rejoinder.
Traversing
Duress.

And the said defendant, as to the replication aforesaid of the said plaintiff, says that the said plaintiff freely and voluntarily made the said deed of release, and not by force and duress of imprisonment in manner and form as by the said replication is alleged. And of this the said defendant puts himself upon the country. And the said plaintiff doth the like. And thereupon came a jury, to wit: Samuel Marston [and eleven others], who being duly elected, tried and sworn the truth to speak upon the issue joined, upon their oath do find for the plaintiff and do assess his damages by reason of the breach of covenant in the declaration assigned, at five hundred and fifty-five dollars, with lawful interest thereon from the — day of —, in the year of our Lord, eighteen hundred and seventy —, until paid.

Similiter
and Issue.
Jury
Impanelled.
Verdict.

Judgment.

Therefore, it is considered by the court that the plaintiff do recover against the defendant his damages assessed as aforesaid, with interest thereon, to be computed at the rate of six per centum per annum, from the — day of —, in the year of our Lord eighteen hundred and seventy —, until payment, and his costs by him about his suit in this behalf expended. And the said defendant in mercy, &c.

Bill of
Exceptions.

Memorandum.—On the trial of this cause the defendant, by his attorney, excepted to an opinion of the court given against him on the trial aforesaid, and tendered his bill of exceptions; which was received, signed, and sealed by the court, and ordered to be made part of the record in the said cause, and is in these words, to wit:

“*Be it remembered*, that upon the trial of this cause, the plaintiff, to maintain the issue on his part, offered in evidence a paper-writing in the words and figures following, to wit: ‘This is to certify to whom it may concern, that a certain release of all covenants and damages which I hold, purporting to have been executed by Charles Covenantee to me, was never intended to be used or applied to prevent recovery upon any contract of lease between us, and that the purpose for which I extorted it from him has been answered.

“Witness, (Signed) CHRISTOPHER CONTRACTOR.

“ROB'T M. BELCHER,

Dec. 26, 187—.

Which paper-writing the said plaintiff proposed to prove to have been executed by the defendant, by means of a witness, one Zebulon Crane, who was not the attesting witness to the said paper, having first

proved that Robert M. Belches, the attesting witness thereto, is not now a resident of, nor to be found within this Commonwealth, nor is in any wise subject to the process of its courts; but is now in, and a resident of the State of Tennessee. To the introduction of any other testimony to prove the execution of the said paper-writing, except that of the attesting witness, under the circumstances aforesaid, the defendant, by his counsel, objected, on the ground that the non-residence of the attesting witness was not of itself, and standing alone, sufficient to justify the admission of secondary proof of the execution of the said paper-writing, since it did not appear that the deposition of the said attesting witness might not have been taken, to be read in this cause, notwithstanding such non-residence. But the court overruled the said objection of the said defendant, and admitted the said Zebulon Crane to testify touching the execution of the said paper-writing by the said defendant, and the said Crane did thereupon testify accordingly, and thereupon the said paper-writing was read in evidence to the jury. And to this opinion of the court over-ruling the said objection, the defendant, by his counsel, excepts, and prays that this, his bill of exceptions, may be signed, sealed, and made part of the record in this cause, which is done accordingly.

"A copy—Tests:

B. T., C. C."

*Certificate of
Error.*

COUNSEL'S CERTIFICATE OF ERROR.

V. O. 1873, c. 178, § 8.

I, ——— an attorney, practising in the supreme court of appeals, of Virginia, (or in the appellate court, whatever it is,) do certify that, in my opinion, it is proper that the decision of the circuit court of A. county (or whatever is the inferior court), in the cause of Charles Covenantee v. Christopher Contractor, of which the record is annexed, should be reviewed by the supreme court of appeals (or whatever is the appellate court.)

Given under my hand this — day of —, in the year of our Lord 187—.

(Signed), R. F. S.

*Petition for
Writ of Su-
persedeas.*

PETITION FOR A WRIT OF SUPERSEDEAS.

V. O. 1873, c. 178, § 8.

To the Honorable the Judges of the Supreme Court of Appeals of Virginia:

Your petitioner, Christopher Contractor, represents that on the — day of —, in the year of our Lord 187—, a suit was instituted in the circuit court for A. county, on the common law side thereof, by Charles Covenantee against your petitioner, whereupon such proceedings were had that a final judgment in the said cause was rendered against your petitioner, in the said circuit court, on the — day of —, in the year of our Lord eighteen hundred and —, a transcript of the record of the proceedings in which suit, and of the judgment therein, is herewith exhibited.

Your petitioner is advised, and represents to your honors, that the said judgment is erroneous, and that he is aggrieved thereby, in the following particulars, namely:—

[Here set forth *with precision* the errors complained of, numbering them in *separate paragraphs*, as 1, 2, 3, &c.]

And your petitioner further represents that the said judgment is in other respects uncertain, informal and erroneous.

Your petitioner therefore prays that a writ of *supersedeas* may be awarded him, in order that the said judgment, for the causes of error aforesaid, before you may be caused to come, that the whole matter in the said judgment contained may be re-heard, and that the judgment may be reversed and annulled. And your petitioner will ever pray, &c.

(Signed), CHRISTOPHER CONTRACTOR.

Appeal Bond.

UPON OBTAINING A SUPERSEDEAS, APPEAL, &c.

V. C. 1878, c. 178, § 13, 14.

Know all men by these presents, that we, Christopher Contractor and Solon Surety, are held and firmly bound unto Charles Covenantee in the sum of ——— dollars, to be paid to the said Charles Covenantee; For the payment whereof, we bind ourselves and our heirs, jointly and severally, by these presents. Sealed with our seals and dated this — day of —, in the year of our Lord eighteen hundred and seventy —

The condition of the above obligation is such that whereas the said Christopher Contractor hath obtained from one of the judges of the supreme court of appeals of Virginia, a writ of *supersedeas* to a judgment rendered against him in the circuit court of A. county for the sum of ——— dollars, with interest thereon after the rate of six per centum per annum, from the — day of —, in the year of our Lord eighteen hundred and —, until paid, and the costs in favor of the said Charles Covenantee, for causes of error in the record of said judgment appearing, as it is said; now if the said Christopher Contractor shall well and truly pay, perform, and satisfy the judgment aforesaid, in case the same shall be affirmed, or the said writ of *supersedeas* shall be dismissed, and shall also pay all damages, costs and fees, which may be awarded against or incurred by the said appellant, then the above obligation to be void, or else to remain in full force and virtue. (Signed.) CHRISTOPHER CONTRACTOR, {SEAL}

SOLON SURETY, {SEAL}

WRIT OF SUPERSEDEAS.

V. C. 1878, c. 178, § 11.

The Commonwealth of Virginia,

To the Sheriff of A. County greeting:

We command you, that from all further proceedings on a judgment of our circuit court of A. county, obtained on the — day of — in the year of our Lord eighteen hundred and seventy — by Charles Covenantee against Christopher Contractor, for ——— dollars, with interest thereon after the rate of six per centum per annum, from the day of —, in the year of our Lord eighteen hundred and seventy — until paid, and the costs, you altogether supersede; which judgment before the judges of our supreme court of appeals for cause of error in the same to be corrected, on the humble petition of the said Christopher Contractor, we have caused to come, he, the said Christopher, having given secu-

urity to prosecute with effect; and if the judgment aforesaid shall be affirmed, or if this writ shall be dismissed, to satisfy and pay the said judgment, and all costs and damages which shall be awarded against him. We also command you, that you give notice to the said Charles Covenantes, that he be before the judges of our said court of appeals, at the State court-house, in the city of Richmond, on the — day of — next, then and there to have a re-hearing of the whole matter in the judgment aforesaid contained. And have then there this writ.

Witness, G. L. C., clerk of our said supreme court of appeals, at Richmond, this — day of — in the year of our Lord eighteen hundred and seventy —, and in the — year of our foundation.

Teste:

G. L. C., C. C.

